Marilyn Castro
P.O Box 64002
Virginia Beach, VA 23462

June 19th, 2008

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: EX PARTE PRESENTATION
Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51
Further Notice of Proposal Rulemaking

Dear Ms. Dortch:

On June 18th, 2008 consumers from the State of Virginia and Florida met with Ms. Elizabeth Andrion Legal Advisor to Chairman Kevin J, Martin. The purpose of this meeting was to provide consumer feedback on the business activities of our telecommunications providers, and how it pertains to MB Docket No. 07-51.

Specifically, we provided Ms. Andrion information regarding the unfair business practices of our telecommunications providers, their market manipulation and monopolization tactics, and the clear conflict of interests that exists through the management of contracts that obtain their services. Additionally, we discussed how bulk billing arrangements have enabled these providers to continue these practices unabated.

Based on our discussions, consumers from the State of Virginia and Florida are respectfully asking the commission to prohibit any type of bulk services, bulk billing, exclusive bulk billing and exclusive marketing agreements. It is our belief that these types of agreements

are attempts to bypass current telecommunications and antitrust laws[1]. Further, these corporations (MVPD, PCO, DBS or Special Purpose Entities) provide telecommunication services to a large number of customers using monopolies with prevailing or new service providers, under unregulated conditions, and with disregard to consumers' rights[2].

It is our further opinion that bulk services or bulk billing agreements are more burdensome on consumers than exclusivity clauses alone because bulk billing agreements cover bulk services that typically includes cable, internet and telephone. These services are also provided at a premium price under the false pretense of getting a special price or a discount. Additionally, the creator of the special purpose entity profits from the discount and the customers end up paying standard market rates or worse[3]. Bulk Services arrangements are also contrary to Congressional efforts to advance broadband technology in the United States.

Through the administration of these bulk billing agreements, our telecommunications providers are able to eliminate competition and limit telecommunication advances for the communities affected. These providers simply do not have the infrastructure to keep up with technological advances or deliver comparable market offerings.

The only effective means to improve our arrangements is through open competition markets with consumer and community protections. Any company, regardless of industry sector, that provides telecommunications or cable services, should be regulated. No citizen of the United States of America should have to review hundreds of pages of contracts or spend thousands of dollars to hire a lawyer to obtain or change telephone, cable or internet services.

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[1] U.S.C § 2, Monopolizing trade a felony; penalty
http://www.law.cornell.edu/uscode/15/usc_sec_15_00000002----000-.html
[2] 47 U.S.C. 151, Communication Act of 1934
http://www.law.cornell.edu/uscode/47/usc_sec_47_00000151----000-.html
[3] Reply Comments City of Reedsburg Exhibit A Charter Communication Agreement
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519862759

Our discussion points were consistent with comments previously filed in this proceeding. A summary of topics of discussion were provided to Ms. Elizabeth Andrion. A copy has also been provided here as an attachment and should be included in the record of this proceeding.

Sincerely,

Marilyn Castro

Marilyn Castro

Cc: Dwayne F. Cotti
Brian Beahm
Zuriel Cabrera

Introduction

Consumers within the States of Virginia and Florida are currently being provided telecommunications services through contractual arrangements that limit competition, prevent technology refreshes, have pricing structures that do not represent market trends, and in some cases are administered by parties that are in a conflict of interest. The ability for these contractual situations to exist is born from exclusivity clauses coupled with bulk billing arrangements.

The following provides information regarding three specific arrangements and argues for the implementation of regulations that bans bulk services arrangements.

Summary of Three Contractual Arrangement

A. Lexington, VA

By Marilyn Castro

Currently, we have a *Communications Agreement, Instrument Number 20060126000139270 recorded in the City of Virginia Beach, VA* between our Master Homeowner Association and a "Special Purpose Entity, Lexington Infrastructure Management (LIM)" enclosure (1). The developer owned LIM was created to provide communication services to our community. This contract is for a term of up to 75 years. The LIM, in turn, entered into a contract with COX Communications for delivery of the actual services. This contract was placed into effect before most homeowners moved in and during the period of declarant control. Additionally, this contract binds all homeowners to pay $146.00 per month for Communications Services as part of our homeowner's assessments. The Master Homeowners Association is currently controlled by the developer and Cox Communications is the only provider of services on the property.

Although, homeowners have the ability to contract directly to other vendors for services, due to the bulk services agreements in our HOA managed contract we still are required to pay our full $146.00 monthly fee to the master homeowner association. The contract requires each homeowner to pay the communication assessments regardless; homeowners intend to use the

Basic Services. This contract creates a financial burden to the HOA as the collector for the assessments of each unit. Section 4.5 give the right to the LIM to suspend the provision of Basic Services to all Homeowners (**including those that are current in the homeowner assessments**) if the Master Homeowner Association pursuant to this agreement are in arrears for more than sixty (60) days.

There are no incentives for other providers to invest in a community locked for 75 years, which limits our alternatives. Additionally, all prospective customers are bound to Cox Communications, and most families cannot afford or simply would not pay twice for similar services. This raises the question; is the LIM acting as a private cable operator engaged in a bulk services contract as the only established cable operator violates antitrust laws? "A cable operator taking "channel service" from a common carrier, without having ownership of the transmission facilities, is none the less a cable operator."[1]

There are other newly built communities in our area that have the same type of agreement; some using COX Communications or Charter Communications and in contract with a created "Special Purpose Entity". Instrument number 20071004001351240 recorded in the City of Virginia Beach, VA reflect a new community of 334 units not yet 10% built, with a communication agreement in place.

Under these bulk services contracts the goals of the Virginia Telecommunication Bill of Rights could never be attained[2]. Customers will never be able to chose among providers or have a clear and understandable bill. The Cable Television Consumer Protection and Competition Act of 1992 Sec 14, details that cable billing should be itemized.[3]

We have never received an itemized cable or phone bill from our association. Even when Cox sends us a bill every month it contains telephone charges set to $0.00 and only outlines

[1] From case No.98-50874 Us Court of Appeals for the Fifth Circuit City of Austin V. Southwestern Bell Video Services, INC., http://www.millervaneaton.com/briefs_memos/austin_brief.html
[2] Virginia State Corporation Commission Bill of rights, http://www.scc.virginia.gov/puc/bor.aspx
[3] Cable Television Consumer Protection and Competition Act of 1992 Sec 14, http://www.caltelassn.com/Reports06/CommLaw/CableTVConsumerProtectionAct1992.pdf

additional fees for services that are not included in the established contract. This is in direct contradiction to the Cable Television Consumer Protection and Competition Act of 1992 Sec 14 and the Virginia Telecommunications Bill of Rights.

As a paying customer, we don't know the itemized value of telephone, internet or cable. We also don't know how much the special purpose entity gets paid. Section 5.2 (e) of the communication agreement explain the relationship between the developer and the LIM.

> ***Lim Affiliation with Developer*** "The association acknowledges that LIM is an affiliate of Sandler at Brenneman Farm, L.L.C., the developer of the Development, and that LIM will receive compensation from the Association for its performance under this Agreement through the charges to the Association for the Basic Services."

We have requested a copy of the contract between LIM and Cox Communication. Although, homeowners are third party to this agreement, the request for contract information was denied. We have no information on the level of service and contract clauses that control the services that we pay every month.

The way these contracts are placed take advantage of consumers. In our case, critical documents on the disclosure were improperly referenced and contract procedures were not followed. These agreements are one sided and the developer is using their upper hand to tie owners to a roughly perpetual agreement. The developer as the declarant of the Homeowners Associated has the fiduciary duty to protect the owner's interest. Further concerns addressed to the developer, homeowner association and COX remains mostly unanswered.

Looking for answers, we requested an investigation by the Virginia State Corporation Commission (SCC) enclosure (2). When the developer and COX were faced with billing questions based on the Cable Television Consumer Protection and Competition Act and Virginia Bill of Rights, Cox Communications and the developer's attorneys drafted a totally unrelated response avoiding the issue, and claiming that the developer properly effected and disclosed the contract. The procedure to effect the "Agreement to Obtain Communication Services" as explained by the developer's attorney, Ms. Carol Hahn Esq. in a Cox Communications Letter,

mentioned that the “Communications Service Agreement” was received as part of the disclosure package. The “Communication Agreement” was not enclosed in the disclosure package for many homeowners. We had to go to the Virginia Beach City Court, clerk office to get a copy of this agreement.

On the issue of disclosure, clause (m) of the Non Binding Reservation Agreement To Become a Binding Purchase Agreement referenced a contract Titled “Agreement To Obtain Communication Services” with Instrument Number 20060126000139260. Instrument Number 20060126000139260 is not the “Agreement to Obtain Communication Services” but rather the “Declaration of Protective Covenants and Restrictions”. Instrument Number 20060126000139260 references a “Communications Service Agreement”. However, there are no instrument numbers attached to this reference. Since the contract was not properly referenced, it was not disclosed.

Further, Ms. Hahn mentions that each homeowner signed a Homeowners Agreement enclosure (3). We have asked the closing agent for a signed copy of the Homeowners Agreement and nobody can find it. Equity Title, a developer own company, conducted the closing on our property and informed us that the developer doesn’t have the signed Homeowners Agreement. The developer has ignored all ours requests, and continues to enforce this contract.

At the time, our only choice is to seek resolution within our court system. However, we tried to hire an attorney who delivered an estimate of $50,000.00 to get out of a contract that we didn’t signed or agreed to in the first place. Even if the community of pooled its resources, we would not be able to obtain legal assistance nor afford a lengthy and costly court litigation**.**

We had asked the Commonwealth of Virginia for assistance. However, the State Attorney didn’t provide an opinion on these practices enclosure (4), requested a Congressional Inquiry enclosure (5) and the State Corporation Commission informed us that the FCC will be making a decision in relation to bulk services. Therefore, our only recourse is the Federal Telecommunication Commission, and its current considerations to outlaw bulk services

arrangements. We expect that when the FCC ruling is finalized, to cover MVPD, PCO, DBS and developers created companies, it would nullify contracts between homeowners associations and providers on behalf of homeowners, thus enabling us to seek competitive services.

An article from Broadband Properties Title "Master Communications Easement in the Fiber Age" and "Public Rights-of-Way and Marketing Exclusivity" explains the complexity of the legal arrangements to create "wire communities" and is similar to what the developer placed in my community[4] enclosure (6). It explains how the developer maintains control, increases profit, and avoids as many laws and regulations as possible. It also states how to lock-out or make it unattractive for other competitive service providers to deliver services within these communities. This document shows clear intent to limit competition. Coupled with faulty disclosure and contract procedures, the consumer stands no chance against these practices.

B. Broadlands, VA

By Dwayne Cotti

Van Metre Homes negotiated a 65 Year exclusive telecommunications contract with a company, known as OpenBand of Virginia, LLC, to provide basic TV, telephone and Internet Services. Van Metre co-founded OpenBand of Virginia, LLC with M. C. Dean on behalf of the future residents of Southern Walk. Van Metre created the Southern Walk Homeowners Association as a mechanism to collect the mandatory monthly assessment from Southern Walk homeowners. In addition, Van Metre controls the only governing entity, which is the Southern Walk Home Owners Association. The sole purpose of this association is to enforce the "HOA" contract and the mandatory monthly assessment from Southern Walk homeowners as well as approving price increases at their sole discretion. In doing so, Van Metre created an unfair business practice and a telecommunications monopoly for Southern Walk homeowners. In

[4] Broadband Properties Article "Master Communications Easement"
http://www.broadbandproperties.com/2006issues/feb06issues/Hardin%20-%20The%20Law.pdf

addition, Van Metre refuses to address contractual flaws as identified by Southern Walk homeowners.

At the onset of the development of the Southern Walk Community and before a single house was built, Van Metre negotiated with M.C. Dean to create a joint venture call OpenBand. Van Metre then subsequently created and incorporated the Southern Walk @ Broadlands Homeowners Association, Inc. In addition M.C. Dean created OpenBand @ Broadlands LLC, which then spun of two entities: One called Broadlands Communications and the other called OpenBand SPE, II, LLC. Once these entities were established, the Southern Walk @ Broadlands Homeowners Association, Inc. established a contract with one of these OpenBand entities to provide exclusive telecommunications services (TV, Telephone, Internet) to the Southern Walk community through the collection of HOA monthly payments. The contract established and agreed upon on behalf of Southern Walk residents was done so prior to the onset of construction. In addition, the SWHOA contracted to Armstrong Management to manage the collection of dues from HOA residents.

These actions created the means by which Van Metre and M. C. Dean could prevent competition within Southern Walk and establish a mechanism by which they can control pricing as well as profit from revenues obtained through resident HOA payments.

These are the resident's concerns regarding this situation:

1. The contract established between Southern Walk @ Broadlands has a minimum term of 25 years and a maximum term of 65 years with no option to opt out. OpenBand has exclusive rights within the Southern Walk community – furthermore 239 (out of 933) Southern Walk homeowners have DirecTV/Dish Network as their primary TV provider – however they are required to pay the mandatory SW HOA fee.
2. New home buyers are required to agree to these terms or they would not be allowed to purchase a home within the community. (Some original purchasers did not have contract

terms disclosed. Additionally, Van Metre did not start fully disclosing any terms until 2007 after 90% of the community had been built-out)

3. Purchasers of resale homes are not asked to sign any documents to agree to these terms yet it is implied that the terms are inherited during the resale home purchase, which is a contradiction to the SWHOA articles of incorporation.
4. Van Metre holds the majority seats on the Southern Walk HOA Board of directors.
5. Current board membership is set at three Van Metre members and two resident members.
6. In June of 2006 and December of 2006, each resident member positions become vacant. **(These seats have since been filled by two residents. However, Van Metre filled the seats through a selection process, not by a community vote)**
7. By the SWHOA bylaws these positions were to be filled during the first available board meeting or a special meeting is to be called to fill these positions. These replacements would act in these positions until a full community vote can be held in May of 2007.
8. In November of 2006 a nomination for a resident member was brought to Van Metre's attention. Van Metre subsequently rejected that nomination with no explanation.
9. Van Metre cancelled and postponed meetings to prevent this action
10. Pricing for OpenBand services are derived through a comparative analysis of local competitors and set to be "10%" lower than the average prices the competitors set for similar services.
11. The SWHOA board/Van Metre is the sole entity that can approve or disapprove the inclusion of additional competitive pricing in their annual evaluations.
12. Denise Harrover, the VP of the SWHOA Boards and a Van Metre executive, resists adding competitor pricing that could potentially bring pricing down

13. SWHOA residents have identified several areas where the comparative analysis of pricing is inaccurate and flawed.
    a. TV Pricing was compared with no regard to the number of channels being provided and the existence of an SLA. (Openband provided less channels than competitors and does not provide an SLA)
    b. Internet pricing is based on a comparison of Openband's Intranet connection speed to competitor Internet throughput speeds. (again no SLA, whereas competitors provide one)
14. Armstrong Management collects information from OpenBand to include within the annual budget for the SWHOA.
15. The SWHOA/Van Metre approves or disapproves this budget which in turn means they approve or disapprove OpenBand's pricing.
16. The collection of HOA payments by Armstrong has generated an excess of $160,000 in revenue.
17. Through operating agreements, Van Metre is paid *8%* of the revenues collected by Armstrong management and paid to OpenBand through mandatory SWHOA dues. Reference Page 36, Section 5.1 of the operating agreement provided as exhibit (A)**.**
18. Through these same operating agreements, Van Metre is also paid *12%* of the revenues generated by resident payments for premium services paid directly to OpenBand. Reference Page 36, Section 5.1 of the operating agreement provided as exhibit A.

Speaking on pricing, one example submitted to the commission from a Broadlands resident is provided here:

It is stated that customers of OpenBand are protected by the Contract between OpenBand and the HOA from high rates and unreasonable price increases. In fact the contract does state that

the price paid for any service shall be 10% below the cost of comparable service providers in Loudoun County and that our average price paid has only increase 1.1% per year since 2002. Said a different way, OpenBand's rates have increased 5+ percent over the last 5 years when the trend in industry has been a reduction of costs over the same period of time.

It is stated that a competitive analysis is done of the prices of other services providers for comparable services and that the documentation is provided to the HOA. What isn't stated is that the comparison is NOT up for discussion and that the governing body that would approve/reject such analysis (Southern Walk HOA) is controlled by the developer who also happens to have a business relationship with OpenBand. It also does not compare "bundled" services provided by these service providers. As everyone knows you are going to pay more for "al la carte" service selections versus bundled services - therefore their comparable price analysis is already overpriced to begin with. It also does not include satellite networks which have clearly been the driver putting downward pressure on the cable industry over the years.

Mr. Brecher also states that we, as residents, are pointing to short-term or promotional pricing in making the argument we are paying too much. First, I would argue that short-term/promotional pricing should be included since if I chose to leave another provider (e.g. DirecTV) after the promotional pricing was up, that provider would in all likelihood grant me continued promotional pricing and in some cases make the deal even better. Second, I did an analysis of my bill specifically where I used the Post-Promotional pricing costs for the competitors. As you can see below I am clearly paying more that the 10% below comparable that I was promised.

Pricing Analysis

Assumes 4 TVs (including cost for boxes), Phone with Unlimited Long Distance in US and calling features such as Voicemail, Call Waiting, Caller ID, and Internet.

OpenBand Price

Basic services paid through HOA	$149.00
Additional (boxes and Long Distance Package)	$50.00
Total Monthly	**$199.00**

Bundled Service Comparison

(All prices are POST promotional pricing)	
Verizon FIOS - Triple Freedom (Regular)	$172.00
Verizon FIOS - Triple Freedom (Bundle Savings)	$139.00
Comcast Triple Play	$177.00

All 3 Services with NO Bundling Savings

Verizon Phone	$50.00
DirecTV	$83.00
Verizon FIOS	$68.00
Total All 3	**$201.00**

When Comparing OpenBand to the Bundled packages, the cost clearly is above the competition, not the stated 10% below guarantee and even using individual pricing for the 3 services while basically even in cost - it should be 10% below the three.

In closing, it is our assertion that Van Metre has violated anti-trust laws; Van Metre rejects any accountability for the degradation of services provided by OpenBand to Southern Walk homeowners. Van Metre controls the Southern Walk homeowners association as a means to increase their profitability and earnings through a guaranteed "kickback" from OpenBand for exclusivity within Southern Walk.

C. Live Oak Preserve, FL

By Zuriel Cabrera

Currently, we have a *Master Cable Service Agreement* between Transeastern Properties (Presently, Engle Homes) and Century Communication of FL. As reflected in this contractual agreement, service is to be provided to all homes built by Transeastern throughout the State of FL. The communities below have the same type of agreement, and also operate under entities listed below:

Entity Name	Entity Number
CENTURY CORAL LAKES, LLC	L03000028813
CENTURY CYPRESS LANDING, LLC	L03000016660
CENTURY FALCON PARC, LLC	L05000032009
CENTURY FALCON PINES, LLC	L06000054500
CENTURY HAMMOCKS, LLC	L05000006057
CENTURY INDEPENDENCE, LLC	L03000028812
CENTURY JONATHAN'S BAY, LLC	L05000006059
CENTURY JONATHAN'S COVE, LLC	L01000019677
CENTURY KENDALL POINTE, LLC	L05000006055
CENTURY LIVE OAK PRESERVE, LLC	L02000034543
CENTURY OLYMPIA POINTE, LLC	L05000006053
CENTURY SAVANNAH LANDINGS, LLC	L05000006458
CENTURY SAVANNAH PINES, LLC	L05000006534
CENTURY VERSAILLES, LLC	L01000019674
CENTURY VICTORIA GROVE, LLC	L01000019676
CENTURY VICTORIA PINES LANDINGS, LLC	L05000006067
CENTURY VIZCAYA, LLC	L05000006050

It is significant to note that Century Communications of FL INC., is also owned by one of the Transeastern Developer's brothers; Arthur Falcone. Mr. Robert Falcone, (developer) is also partial owner of Century Communications. This contract set up the Falcone Family with a good annuity. His signature can be found on the last pages of each contract as well as registered members of each company (http://www.sunbiz.org).

In our case, Century Communication Live Oak Preserve LLC "CCLOP" was created and entered into a contract with the Live Oak Preserve (LOP) Master HOA as referenced by paragraph 8 of the Transeastern Properties contract "Community Agreement." This contract was entered during the period of declarant control. I recently obtained, overcoming hurdles nonetheless, another contract identifying the three contractual arrangements. Like others across the nation, this contract binds all Live Oak Preserve (LOP) homeowners. The three entities are Century Communications of FL Inc, Century Live Oak Preserve LLC and Live Oak Preserve Association LLC. The developer owned entity was created to provide communication services to our community. This contract is for a term of up to 15 years. Century Live Oak Preserve, LLC, in turn, entered into a contract with Century Communications of FL for delivery of Cable, Internet, and Alarm Monitoring services. From 2003 to 2004 the developer of Live Oak Preserve was also

the owner and operators of the communication service provider, which is currently Century Communications of FL, INC. On June 6, 2008, this contract was sold to Bright House Networks.

For the last three years, Century Communication LLC provided less than adequate services. During those years, residents tried several methods to get the services that were promised and not rendered to Live Oak Community. One of the attempts was a protest in front of their sales office. Please review press articles from the Tampa Tribune dated March 4, 2006, "Sky's The Limit For Residents Unhappy With Cable Service MANY ARE OPTING FOR SATELLITE DISH;" May 4, 2006, "Cable TV Relief May Be On Way, PROVIDER SEEKS TO MAKE CHANGES;" August 8, 2007, "Internet, TV Service Draw Complaints;" "New Tampa residents protest over services," St. Petersburg Times, Dated October 22, 2007..
http://www.sptimes.com/2007/10/22/Hillsborough/New_Tampa_residents_p.shtml
There are also a myriad of emails from Mr. Bill McKissock, Century Communications Vice President/General Manager, addressed to residents of Live Oak Preserve regarding service outages, future upgrades and Century's plan to rectify the problems. Copies of these will be provided in a separate packet for your perusal.

Century Communications contract was placed into effect before most homeowners moved in and during the period of declarant control. Additionally, this contract binds all homeowners to pay $86.00 per month for Communications services as part of our homeowners' assessments. This fee was increased from $68.00 in 2003. The current builder, Engle Homes, assigned several new members to the board of directors to the master homeowners association (HOA). The new members of the HOA, agreed to the sale of Century's contract. Yet again, this business deal demonstrates how Century Communications' former developer (Transeastern), has profited from hard working homeowners. Our new developer Engle Homes subsidiary of TOUSA INC, which is in bankruptcy reorganization agreed to the Estoppel Certificate, selling our contract to Bright House without the community's approval or input.

Although, homeowners have the ability to contract directly to other vendors for services, due to the bulk billing service agreements in our HOA managed contract, we are still required to pay our full $86.00 monthly fee to the master homeowner association. The communication agreement has a clause of a 5% increase per year for the services provided by the agreement. As technology costs typically decrease each year, our contract sees a steady 5% increase. All homeowners under this contract are required to pay the communication assessments regardless of homeowners' intent to use the Basic Services. In addition, homeowners pay for the assessment of homes that are vacant or on foreclosure. This is particularly detrimental to Live Oak residents because out of 985 homes, we have 52 on foreclosure (We are not at full capacity of 1599 homes). This contract creates a financial burden on the HOA as the primary collector for the assessments of each unit and liable by the developer imposed contract to cover all the costs related to collection section 3.3 of the agreement. This also reduces the collection expenses of the service provider, which in turn, the homeowners' inherit. In some cases, the HOA pays more than the provider who has the facilities and infrastructure to handle the collection.

There is very little incentive for other providers to invest in a community locked into a 15 years contract. Additionally, all prospective customers are bound to Century Communications, and most families cannot afford or simply would not pay twice for adequate services. Some residents are on a fixed income and this 5% yearly increase stipulated on the contract creates a hardship on these families. The aforementioned individuals should have the choice of not having to pay for cable/Internet services so they can use those funds for other necessities.

Due to the growing concerns from homeowners across the State of FL and the growing media attention on Century Communication, the company decided to sell their bulk service agreements to Comcast, Bright House and other local providers in an attempt to distance itself one last time before any ruling might take place.

Like others across the country, we the homeowners of Live Oak Preserve never receive an itemized bill from our association. Even when Century sends the HOA a bill every month, it

contains no mention of service breakdown. This is in direct contradiction to the Cable Television Consumer Protection and Competition Act of 1992 Sec 14. Homeowners are inadequately informed of the details of the three contracts before and after closing. All they are given at closing is a form to agree to the HOA declaration which states we are paying for cable through our HOA dues. In our Declaration (Section 2.18), only one paragraph exists regarding Century's agreement. This is a deceptive practice.

After many months of research and documentation, one can conclude that these agreements cause more harm than good to the consumer. Most homeowners across the country are not aware of these practices. Unfortunately, Live Oak Preserve learned the hard way. I, therefore, urge the commission to please ban these agreements and protect the American consumers from exclusive marketing agreements or bulk services agreements.

Why the industry don't want the FCC to ban these agreements

The evidence on the docket shows how MVPD, PCO, DBS, Developers and their attorneys tried any means to justify bulk services agreements. They tried to convince the Federal Communication Commission not to ban these contracts, because we are supposedly getting a *discount or a special price*. What is the discount of an unwanted service? In our cases we have not seen a discount just an increase in prices combined with inferior service. The discount falls in the pockets of the companies that administer our contracts and guarantee exclusivity to our providers. We, as consumers, pay more without having the option to opt-out from services we don't need or are dissatisfied with.

The industry wants to preserve a very successful way to get around regulation and at the same time continued to close competition in the MDU ambiguity. It is not acceptable that any citizen should have to pay twice for telecommunication services just to obtain the services they want or to obtain quality services readily available elsewhere.

The industry has tried the wiring or fiber to the home cost: For new developments the argument that state of art fiber to the home cannot be attained without exclusivity or bulk services arrangements.

The cost of fiber to the home is about $3K per home[5]. If you are buying a $300K home that would be about 1% of the price of the home. Installing a central air conditioning unit on a house cost $3,500.00 or more yet, developers seem to be able to put an air conditioner unit with no exclusive or bulk services arrangements to recuperate cost.

Developers are expected to build and deliver buildings with the entire infrastructure in place i.e. electrical wiring, plumbing system, natural gas and communications, without any expectation of receiving any special long term compensation, outside the profit per unit built. Further, it is expected that any company pay for the cost of infrastructure required for delivery of those services. Consumers will reciprocate that cost by subscribing to those services. The service provider will recuperate the cost by providing good service and by earning consumers for 5 years without a long term contract. This makes the argument of the wiring cost as the justification of bulk services agreement absurd. If a service provider want to make profit it is widely expected they consider the risk and the cost of doing business within their business models. This same infrastructure is placed without additional contractual restriction on single homes and is already proved that MDU pay more in bulk services agreements that single family homeowners. Exhibit (7) shows Cox charges $139.95 for same services provided in the Lexington community area to any customer without any agreement. Meanwhile, Lexington homeowners pay $146.00 for an up to 75 year bulk service arrangement.

The industry has tried "there is not enough evidence in the docket": They claim that we represent a small number of these communities.

[5] The Challenges Associated with a Successful FTTH Deployment, Whitman, Corning Cable System Broadband Properties Article, Sept.2007
http://www.broadbandproperties.com/2007issues/september07/whitman_sep.pdf

The consumer comments on this docket are just the tip of the iceberg. Regular citizens simply don't know the FCC have a mechanism in place to file comments. Middle income citizens are busy trying to make a living in this economy. People are not writing because they don't understand the legal complexities of an exclusive marketing or bulk services agreement. They also don't understand or have not seen the 3 contracts that typically bind them; the contract between the homeowner and the HOA, the contract between the HOA and the special purpose entity, the contract between the special purpose entity and the provider or providers of video, internet and telephone service. They also don't understand the large number of state, federal and real estate laws involved in bulk services agreements and how these agreements are barely legal. They don't understand who is making money and how much they are making, since the money trail is hidden, two layers removed from the homeowner. In many incidences the homeowner was not made aware through disclosures at closing time; what services he will be receiving i.e.: how many channels, internet speed and costs of extra services. In contrast, this information is always provided when homeowner sign for services directly with providers.

The Tip of the Iceberg is 25,000+ MDUs with comments against bulk services

City of Weston, FL The cable contract provides services to a 14,639 single family and 368 multi family residential homes. For a total of 15,007 units
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519839709

Pelican Preserve Ft. Myers, FL 2,700 units upon completion
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519840820

Live Oaks Preserve Tampa, FL 1599 units upon completion with 52 units in foreclosure.
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520010167

Southern Walk, VA 933 units
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520009031

Villa Velletri in Marina Del Rey, CA, 231 unit condo complex

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520013303

Ponderosa Apartments Camarillo, CA 40 units

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519553153

Gateway Golf and Country Club Fort Myers, FL 1100 units

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520003934

Stoney Brook at Gateway, Fort Myers, FL 788 units with 50 units in foreclosure. With 153 units that have not paid their first half 2008 assessment, about 100 units that are at least over a year in arrears.

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519842323

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520013328

Cypress Landing, Fort Myers, FL 699 units

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519872431

The Plaza Midtown, Atlanta, GA 418 units

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519820017

Vizcaya Condominium Association of Bradenton, FL 256 units

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519838683

Venetia, Venice, Florida 643 units upon completion

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519822183

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519822184

Lexington Virginia Beach, VA 410 units upon completion

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520009341

Ballantrae Land O' Lakes, FL 969 units with 70 homes in pre-foreclosure or in foreclosure.

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520029479

The Hammocks Tampa, FL 500 units
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817107

Bridgewater Wesley Chapel, FL 130 units
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519840073

Subdivision Bradenton, FL 92 Homes
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519839530

Luna Park Condominiums WA
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519869054

Isola Bella Homes in Lake Worth Fl 340 units with a long term contract with Adelphia, now Comcast .With 15 homes in foreclosure, and about 25 empty units, or very delinquent in HOA dues. Comcast will not adjust the cost of the contract, or cut services to these units, the association must pay. More information about this community can be provided to the FCC upon request.

Chapel Pines, Wesley Chapel, FL 614 units The Developer, Chapel Pines LLC, signed a 15-year cable contract with Bright House Networks in 2004. The contract entails that the bulk rate billing be applied in their annual HOA fees. The HOA currently have a deficit of $50,000 as a result of this contract.[6] More information about this community can be provided to the FCC upon request.

The industry has tried the amenity and the convenience: They claim that we have the convenience of having services turned on when the owner move in.

We as consumers had to contact our respective providers to have our services activated and in most cases, we had to pay an activation fee to have these services turned on. Telecommunication services provided to a private dweling are not a common amenity. Amenities are for the common use of the owners i.e. swimming pool, ponds and walking trails.

[6] Exclusive Cable TV Deals Off, FCC Says Tampa Tribune By RICHARD MULLINS
Published November 4, 2007
http://www.ccfj.net/FCCexclusivecabledeals.html

The industry has tried to express how these companies could not exist without bulk billing arrangements: They claim that if bulk billing was not allowed, these companies could not obtain the necessary revenues to remain in business.

It is our assertion that these companies could not stay in business because consumers would not purchase their substandard services at high prices they offer them. The only way these types of businesses can succeed is through a captive audience or by engaging in monopolistic practices. The basis of our country's monetary system is one of free trade and competitive system to make the best product for our citizens at the best price.

Why the industry don't want the FCC to ban these agreements

The real truth behind bulk services agreement

- Close competition by doing a long term contract with the HOA. An overbuilder can enter a community only if it has a reasonable prospect of meeting substantial market penetration targets. This will be difficult, if not impossible, to do if the incumbent shut the overbuilder out of substantial portion of the market. Tying up MDUs in a bulk services long contract is another way the service provider have disincentive competition from overbuilder.[7]
- The provider is not under pressure to provide great service or the latest technologies. The way the contract is crafted the provider will get payments and assumes no risk.
- Grants the provider a steady profit while minimizing the risk of non-payments accounts. The service providers invoice the HOA for all the

[7] Reply comm. of Sure West Communications
"There is substantial evidence in the record of this proceeding that the use of Mandatory Bulk Billing Contracts is an unfair method of competition which impedes consumer choice of their preferred MVPD service provider, has the effect of being a barrier to entry for competitors, and thus impairs the deployment of advanced services".
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519864068

units in the community. The HOA take the financial burden, and responsibilities to collect payments from each homeowner. In hard financial times many homeowners in a financial squeeze do not pay homeowners assessments in time or not at all.

- Eliminate company overhead by going from hundreds of invoices to just one.
- The provider receives payment for services not provided. If the unit is empty or in foreclosure the homeowners association have to pay for that unit. Homeowner association fees are last on the debt list when a home goes into foreclosure.

Need for regulation

The Federal Communication Commission (FCC) needs to intervene to protect the citizens of the United States, especially those citizens whose states do not have laws to prevent these types of agreements. These agreements take away the consumer's ability to select the level of service of choice in their private Multi Dwelling Units. The Federal Communications Commission has the responsibility to protect the interest of consumers seeking access to communication networks. We as owners of a MDU by definition need to have the same options single family homes have. We want to decide what type of services we obtain from the common carriers available without having to pay twice.

> "In accordance with 47 U.S.C. § 151 Federal Communications Commission was created for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to ***all the people of the United States,*** without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at ***reasonable charges***, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal

> Communications Commission", which shall be constituted as hereinafter provided, and *which and enforce the provisions of this chapter shall execute*."[8]

Right now, some of us have enough money to pay twice for another overpriced telecommunication service, so we may be able to select the service provider of our choice. This is in direct contradiction with the commission principle of "*reasonable charges*". The ability to select another service provider is further restricted by the reluctance of overbuilders to enter new communities with bulk service agreements.

Rights of the American People

We need to ask if these bulk services agreements violates the First Amendment of the United States Constitution[9]. Freedom of speech or freedom of expression is the right not confined to verbal speech but is understood to protect any act of *seeking, receiving* and imparting *information* or ideas, *regardless of the medium used*. Freedom of speech is protected in the First Amendment of the Bill of Rights and is guaranteed to all Americans. With a bulk service agreements people living in MDU don't have the opportunity to select the information they want to receive by the medium they want to use. If we want the freedom of speech given by the First Amendment we will have to pay twice for telecommunication services. This creates an impediment for citizens to seek these services.

Bulk Services Agreements dictate what line of programming we watch on our private dwellings. Some of the comments on the MB 07-51 even attempt to call telecommunication service an amenity. Our private property is not a common area. Amenities have the characteristic that they are for the common enjoyment of the community. Telecommunication service is not a community amenity, but a private service provided to our residence. In that

[8] 47 U.S.C. 151, Communication Act of 1934:
http://www.law.cornell.edu/uscode/47/usc_sec_47_00000151----000-.html
[9] Constitution of the United States of America, Bill of Rights
http://www.law.cornell.edu/constitution/constitution.table.html#amendments

regard it should be the level of service that we desire and not what is imposed by someone else. Just like consumers are free to choose the community they live in, consumers should be free on their private dwelling to enjoy the services they like without intrusive third party contracts infringing on our private property.

Other important aspect we can't overlook is the aspect of the compensation for private property. U.S Constitution Fifth Amendment's guarantees "that private property shall not be taken without just compensation".[10] Bulk services contracts might create property rights conflicts. Binding privately owned MDU deeds to a telecommunications contract creates third party infringement on private property. The owner of the MDU does not receive any compensation for the bulk services agreement while the creator of the agreements receives profit from the agreement. If we decide to sell our properties, not only would we have to sell the house, but we would also have to find a buyer that agrees with the financial liability of an exclusive bulk service contract that does not benefit the owner in any way, yet it is bind to our property deed.

Bulk services agreements could be discriminatory to disable citizens. These citizens need special devices, and some of them are in tight budgets. If the citizen live in a MDU by definition the contract established by a developer or homeowners board of directors require these citizens to pay for services they may not be able to use.

[10] Constitution of the United States of America, Bill of Rights
http://www.law.cornell.edu/constitution/constitution.billofrights.html

Conclusion

Bulk services arrangements require citizens living in MDU by definition to pay for services they either don't need or want. We live in communities where foreclosure rates are high, we have to paid $3.85 gallon of gas, and we have grocery inflation of 6.7%[11]. We know these bulk billing arrangements are very appealing to the industry because providers received payment for services not provided or wanted. Service providers receive payment regardless of occupancy or economical hardship that forces some people to do without. These types of arrangements are contrary to the capitalism economy of The United States of America. Citizens living in MDU demand open competition, and not the financial monopoly of bulk service arrangements.[12]

The problem is when the HOA enter into a communication agreement with a MVPD, PCO, DBS or Special Purpose Entity, the HOA become responsible for the whole payment including the houses that are for foreclosure. In that case the HOA has to incur on special assessments or draw from reserves to cover for the defaulted units while the service provider is paid in full. We, the middle class, are the ones who move the economy. We surely don't want to pay for our neighbor's cable bill.[13] Unfortunately, this is happening in many cases across the country.

The only parties benefiting from bulk billing arrangements are those corporate entities who deliver telecommunications services to our communities or administer these contracts. We did not receive adequate disclosure of contract terms at closing, were tricked into agreeing to these contract terms, and in some cases automatically assumed to have agreed to them without signing any legal documentation.

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[11] Business Week Grocery Inflation Data
http://www.businessweek.com/mediacenter/video/businessweektv/c42d9e333613677355dcd13e6fc59a88a653117a.html
U.S. Department of Labor Bureau of Labor Statistics Consumer Price Index
http://www.bls.gov/cpi/home.htm#news

[12] Antitrust Division of the U.S. Department of Justice Re; H.B.1500, Cable and Video Competition Law of 2007 http://www.usdoj.gov/atr/public/comments/223444.htm

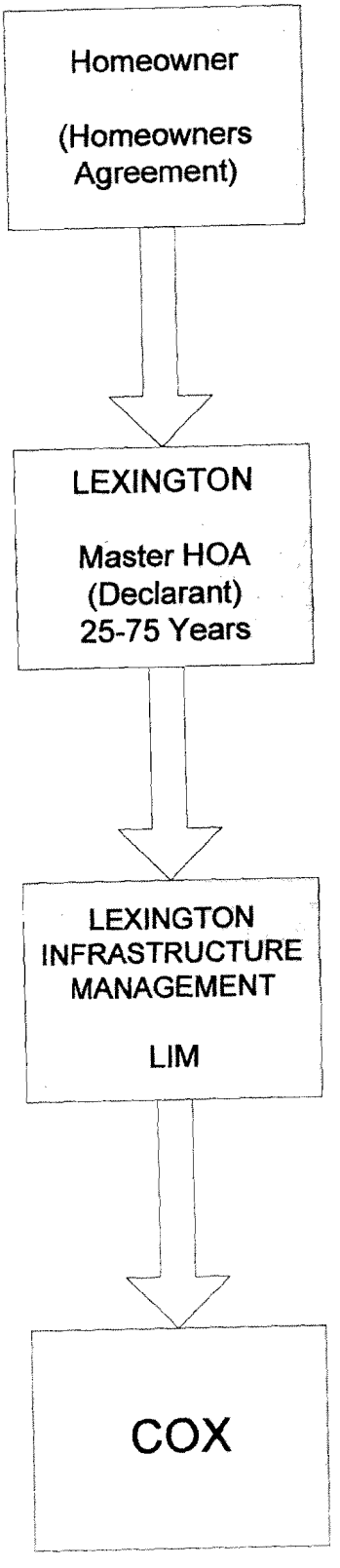
[13] On the Hook For Your Neighbor's Cable Bill" By RICHARD MULLINS, The Tampa Tribune
http://www2.tbo.com/content/2008/mar/08/na-on-the-hook-for-your-neighbors-cable-bill/

We are unable to seek alternative services and must pay the mandatory HOA fees for services not used, wanted or inadequate in quality. Even if we have the legal right to discontinue payment, we are unable to do so due to threat of liens against our properties. The builders, HOA's, and providers have left us little to no recourse other than to seek legal action, which they know most of us cannot afford to the extent that they are fiscally able to drag this out.

The only way to protect our consumer rights is through intervention by the FCC and a ban on exclusive marketing and bulk services agreements. We need the FCC to give MDU residents the benefits of fair competition without paying double for services or have a lien against our properties.

Enclosure (1)

LEXINGTON CONTRACT MATRIX



"Agreement To Obtain Communication Services" Lexington, VA

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Prepared by and
after recording return to:
Faggert & Frieden, P.C.
222 Central Park Avenue
Suite 1300
Virginia Beach, Virginia 23462

20060126000139270 Pg. 1 OF 34
City of Virginia Beach
01/26/2006 01:01:40 PM RGMT
Tina E. Sinnen, Clerk

AGREEMENT TO OBTAIN COMMUNICATIONS SERVICES

This AGREEMENT TO OBTAIN COMMUNICATIONS SERVICES (this "**Agreement**") is made as of December 26, 2005 (the "Effective Date"), by and between LEXINGTON INFRASTRUCTURE MANAGEMENT, L.L.C., a Virginia limited liability company ("**LIM**"); LEXINGTON OWNERS ASSOCIATION, INC., a Virginia non-stock corporation (the "**Association**") (individually, a "Party" and collectively, the "Parties", and for indexing purposes, each Party is both a "Grantor" and a "Grantee").

RECITALS

A. The Association is a Virginia non-stock corporation, governed by its by-laws and the Declaration (as defined herein) and established for, among others, the purpose of providing services to homeowners in, and residents of, the Development (as defined in Section 1.1 herein);

B. LIM is a Virginia limited liability company established for the purposes of managing and coordinating the provision of Communications Services (as such term is defined in Section 1.1 herein) at the Development;

C. The Association desires to engage LIM to act as its agent to manage and coordinate the provision of the Communications Services to the Development; and

D. The Association and LIM wish to enter into this Agreement to set forth their respective rights, duties and obligations.

In consideration of the mutual covenants and agreements set forth in this Agreement and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I
DEFINITIONS

Section 1.1 **Definitions.**

"Agreement" shall mean this Agreement to Obtain Communications Services entered into by and between LIM and the Association.

"Basic Services" shall mean the Internet Services, the Telephone Services and the Video Services provided for which Homeowners pay as a part of their required Association assessments in accordance with this Agreement.

RECEIVED
VIRGINIA BEACH CIRCUIT CT.
2006 JAN 23 AM 11: 12
TINA E. SINNEN, CLERK

GPIN: 1476-72-1140, 1476-82-7902
1476-71-5481, 1476-72-8299

"Communications Services" shall mean the communications services specifically delineated herein as Basic Services and Premium Services, provided by Service Providers over the term of this Agreement.

"Declaration" shall mean the Declaration of Covenants, Conditions and Restrictions (Lexington Owners Association).

"Deed of Easement" shall mean that certain Deed of Easement from Sandler at Brenneman Farm, L.L.C., a Virginia limited liability company, to LIM related to private easements for the exclusive provision of Communications Services for the Development intended to be recorded in the land records in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia, the form of which is attached as Exhibit A hereto.

"Development" shall mean Lexington, a residential subdivision development located in the City of Virginia Beach, Virginia.

"Homeowner" shall mean each owner or tenant of a residential dwelling in the Development.

"Infrastructure" shall mean the telecommunications infrastructure located within the Development that is used to deliver the Communications Services.

"Internet Services" shall mean services which permit access to the worldwide system of computer networks as originally conceived by the Defense Advanced Research Project Agency (DARPA) and as such service continues to evolve. Technically it is distinguished by its use of the Internet Protocol (IP), offering local and global connectivity and applications. IP based applications, such as email, www, hypertext, browsing, dial transfer, Internet chat, and Internet telephony, are considered Internet applications. Initially, Internet Services shall consist only of those Internet Services available through Cox Communications Hampton Roads, L.L.C., at the Preferred Tier Cox High Speed Internet service level and shall include cable modem rental, interactive program guide, one (1) digital receiver and one (1) remote control.

"Premium Services" shall mean those Communications Services provided or made available to Homeowners on an elective basis that are not identified as Basic Services.

"Service Provider" shall mean the company or companies selected by LIM to provide one or more of the Communications Services. Initially, the Service Provider shall be Cox Communications Hampton Roads, L.L.C.

"Standard Retail Price" shall mean the price charged by Cox Communications Hampton Roads, L.L.C., for the Basic Services in the market after the expiration of any special introductory offers or one-time promotional discounts.

"Telephone Services" shall mean services that transmit voice, data and/or video over the traditional circuit switched public switched telephone network (PSTN) and packet switched wireless cellular/Personal Communications Services (PCS) networks. Also included may be many applications and adjunct services such as voice mail, call waiting, caller ID, conference calling, call forwarding, call return, long distance alert, priority ringing, and local and long

distance dialing services. Initially, Telephone Services shall consist only of those Telephone Services available through Cox Communications Hampton Roads, L.L.C., at the Cox Digital Telephone with the Nationwide Connections Plan service level which includes unlimited local and long distance calling, five (5) calling features (caller ID, call waiting, call return, long distance alert and priority ringing) and voicemail.

"Video Services" shall mean services that provide traditional video programming throughout the Development in either analog or digital format. This may include programming sources received *via* satellite and off air local transmission. Also included may be advanced services such as pay per view, access to video on demand, interactive television, gaming, and web enabled television. Initially, Video Services shall consist only of those Video Services available through Cox Communications Hampton Roads, L.L.C., at the Standard Cable service level, which includes approximately 70 channels, and the Digital Cable – Deluxe service level, which includes approximately 240 channels, 47 CD quality music channels and access to Entertainment on Demand, and one (1) analog channel for use as a community channel.

Section 1.2 **Recitals**. All recitals set forth above are hereby incorporated by reference as set forth in this Agreement.

ARTICLE II
ENGAGEMENT

Section 2.1 **Engagement of LIM**. Subject to the terms and conditions of this Agreement, the Association hereby engages LIM as its exclusive agent, and LIM accepts such engagement, to coordinate or arrange for, manage and monitor the provision of the Communications Services to Homeowners. LIM will coordinate or arrange for the design, installation, and operation of the Infrastructure to provide the Communications Services under the terms set forth herein. In its role as exclusive agent of the Association, LIM shall (1) select the Service Provider(s) who will design, construct, maintain, repair and use the Infrastructure at the Development to provide Communications Services to the Homeowners; (2) negotiate and enter into bulk service agreements with such Service Provider(s) consistent with the terms hereof; and (3) terminate any designated Service Provider(s) and replace any designated Service Provider(s) with another Service Provider consistent with the terms of this Agreement and the service agreements with such Service Provider(s). LIM's agency as set forth above is coupled with LIM's interest in the easements granted to it pursuant to the Deed of Easement and such agency shall be irrevocable during the term of this Agreement. The Association shall not directly or indirectly undertake any activity within the scope of LIM's exclusive agency pursuant to this Agreement. LIM and the Association agree that LIM's compensation for its services as agent pursuant to this Agreement shall be included in the prices for Basic Services as determined pursuant to Section 3.6 hereof.

2.1.1 Use of Third Party Providers. The Association acknowledges that LIM may engage one or more third party Service Providers to provide one or more of the Communications Services.

2.1.2 Infrastructure Not a Part of this Agreement. The Association acknowledges that the Infrastructure is not owned by LIM or the Association and that the

Infrastructure may be used by Service Providers to provide Communications Services to homeowners and/or customers outside the Development. Use of the Infrastructure by Service Provider(s) to serve homeowners and customers outside the Development is not subject to the terms, conditions or covenants of this Agreement.

2.1.3 Premium Services. LIM shall provide to Homeowners the option to obtain Premium Services. Notwithstanding anything to the contrary contained in this Agreement, Premium Services shall not be governed by the terms of this Agreement, but are to be governed by any subscription or service agreement for such services entered into by and between the Service Provider(s) of such Premium Services or its subcontractor and the Homeowner ("Subscription Agreement"), and applicable tariffs and rate schedules. Such Service Provider(s) shall contract directly, or through a subcontractor, with the Homeowners for the provision of Premium Services and shall not be required to provide Premium Services to Homeowners who do not agree to the terms and conditions offered by such Service Provider(s) or its subcontractor.

Section 2.2 Homeowner Arrangements.

2.2.1 Homeowner Arrangements for Basic Services. The Association, on behalf of each Homeowner, agrees to require that each Homeowner, concurrently with the closing of the purchase by such Homeowner of a house within the Development, enter into the Homeowner Agreement substantially in the form attached hereto as Exhibit B, regardless of whether such Homeowner intends to use the Basic Services. The Association will use reasonable efforts to cause Homeowners to enter into such Homeowner Agreement. The Association agrees to deliver a copy of the Homeowner Agreement to each new Homeowner contemporaneously with any such closing. The Association shall establish a procedure for notifying LIM or its designee of resale closings so that LIM or the Service Provider(s) may coordinate activation. Once the Homeowner Agreement is signed by a new Homeowner at closing, the Association will forward a copy of such signed Homeowner Agreement to LIM or its designee.

2.2.2 Homeowner Arrangements for Premium Services. The Association, on behalf of each Homeowner, agrees that if any Homeowner desires to obtain Premium Services, such Homeowner shall have the option, but not the obligation, to engage the appropriate Service Provider to provide specifically identified Premium Services to such Homeowner. In such event, such Homeowner will be permitted to contract directly with the appropriate Service Provider or its subcontractor for such Premium Services, to pay additional sums to the appropriate Service Provider or its subcontractor in accordance with the terms of any Subscription Agreement and/or applicable tariff or rate schedules set forth from time to time by the appropriate Service Provider or its subcontractor for such Premium Services. Any such fee for Premium Services shall be in addition to any assessment such Homeowner is automatically required to pay for the Basic Services by virtue of its ownership of any parcel of real property within the Development.

2.2.3 Homeowner Arrangements with Alternative Providers. Homeowners shall have the option, throughout the term of this Agreement, in their sole discretion, to obtain any Communications Services, including Basic Services or Premium Services from any and all providers other than those Service Providers designated by LIM. In such event, Homeowners will not be relieved of their obligation to pay for Basic Services, but will not be required to pay

for any Premium Services or for anything other than Basic Services (except to the extent they have subscribed for such Premium Services or other Communication Services).

Section 2.3 **Service Standards**. The provision of the Communications Services by each Service Provider or its subcontractor shall be at a level taken as a whole which level is not consistently and substantially below the overall technical quality of service provided by the Service Provider providing similar services under comparable rate plans to individual homeowners (other than Homeowners) who reside within five miles of the Development ("Service Quality").

Section 2.4 **Residential Use**. Due to the fare structure and demand requirements, the Internet Service shall be used for residential, home office or telecommuter use only.

ARTICLE III
PAYMENT; ASSESSMENTS; PRICING OF SERVICES

Section 3.1 **Bills for Basic Services**. Pursuant to the Declaration, (i) each Homeowner is required to pay homeowner assessments for liabilities of the Association, including expenses for Basic Services whether or not such Homeowner uses any of the Basic Services; and (ii) the Association budgets for and collects monthly assessments from all Homeowners for Basic Services rendered to the Development or otherwise included in the Declaration. The Association shall include the assessment for the Basic Services in the billing to the Homeowner as part of its regular periodic Association assessment, which will be no less frequently than monthly. LIM will submit a monthly invoice to the Association for the Basic Services. The Association acknowledges that the Service Providers or its subcontractor will bill the Homeowners directly, or through an agent, for any applicable installation or activation charges. Within thirty (30) days after the Association's receipt of such invoice, the Association will pay LIM or its designee, all amounts shown on such invoice. If the Association fails to make such payments within thirty (30) days after they are due, the Association shall be assessed a late fee of one and one half percent (1½%) per month of the outstanding balance due until paid. The monies owed to LIM for Basic Services shall not be contingent upon the Association's collection of Association assessments from Homeowners. LIM will, with the Association's reasonable cooperation, provide updates in advance of annual price changes of Basic Services to the Association sufficient to permit the Association to adjust its budget accordingly to collect the appropriate assessments from the Homeowners. LIM or its subcontractor shall be responsible for ensuring that the billings to the Association will be sufficiently detailed and will comply with all applicable laws and rules including, without limitation, truth-in-billing rules. It is expressly understood that the Association will only collect assessments for the Basic Services as part of the collection of monthly assessments from the Homeowners, and the Association shall have no right or obligation to invoice or collect fees for Premium Services.

Section 3.2 **Bills for Premium Services**. The appropriate Service Provider or its subcontractor will bill or invoice each Homeowner separately and directly for all Premium Services requested by such Homeowner. Each bill or invoice to a Homeowner will include instructions for such Homeowner to remit payment directly to the appropriate Service Provider or its subcontractor, by or on a designated date. The appropriate Service Provider or its subcontractor shall be responsible for ensuring that the billings will be sufficiently detailed and

will comply with all applicable laws and rules including, without limitation, truth-in-billing rules. The Association acknowledges that the appropriate Service Provider or its subcontractor has the right to commence any and all collection actions available to it under applicable law.

Section 3.3 Late Payment for Assessments by a Homeowner. Notwithstanding the failure of a Homeowner to pay timely Association assessments, which, pursuant to the terms of the Declaration, the Homeowner Agreement and the terms hereof, include all properly due applicable assessments for Basic Services, the Association shall nevertheless pay the amount invoiced under Section 3.1 above to LIM or its designee. If a Homeowner does not pay its Association assessments to the Association within thirty (30) calendar days of receipt by the Homeowner of a late payment notice from the Association, upon the request of the Association, LIM or its subcontractor shall, to the extent consistent with applicable rules and laws, suspend the Basic Services (and any other Communications Services dependent thereon) to the delinquent Homeowner.

Section 3.4 Late Payments for Premium Services. Late payments by a Homeowner for Premium Services shall be governed by applicable tariffs and any Subscription Agreement entered into by the Homeowner for such Premium Services.

Section 3.5 Interest and Late Charges. Nothing herein will be construed to prohibit, consistent with applicable law, (i) the appropriate Service Provider or its subcontractor from charging Homeowners interest, collection fees and/or late fees on any overdue or past due amounts for Premium Services and (ii) the Association from charging Homeowners interest and/or late fees or on any overdue or past due amounts for Association assessments not timely paid by such Homeowner.

Section 3.6 Charges for Basic Services.

3.6.1 Pricing of Basic Services. The initial monthly charge to the Association for the provision of Basic Services to each Homeowner as of the date hereof shall be the amount equal to ninety percent (90%) of the Standard Retail Price. Prices may be amended once per twelve-month period by LIM. Notwithstanding the foregoing, LIM may, subject to and in accordance with applicable legal and regulatory requirements, include taxes and regulatory fees in the monthly prices of Basic Services. During the term of this Agreement, the charges for the Basic Services shall not exceed an amount equal to the rate charged by the applicable Service Provider for similar Basic Services of equal quality as required under this Agreement (excluding short-term and promotional pricing) determined once a year at the time LIM announces its annual rate structure. Internet speed will be comparable to the Internet speed of the initial Internet Services.

3.6.2 Homeowner Challenges to Pricing. Any Homeowner may challenge LIM's pricing as violating this Section provided such Homeowner brings an action within six (6) months of the effective date of the new rates in accordance with the dispute resolution process described in Section 6.1 below. If such action is successful, Homeowners shall be entitled to a rebate or credit (at LIM's election) of the difference between the rate actually charged and the maximum rate allowable under this Section. If the audit in Section 3.8 below shows that the

Association has overpaid its fee to LIM, then the Association will be entitled to a rebate or credit (at LIM's election) of the amount of the overpayment.

Section 3.7 Homeowner Deposits. The appropriate Service Provider or its subcontractor may collect any deposit from each Homeowner in connection with Premium Services and any equipment to be rented or purchased by the Homeowner from the appropriate Service Provider in connection with Basic Services (collectively, the "Deposit"). The amount of the Deposit(s) shall be no greater than the amount customarily charged by such Service Provider and otherwise allowed by applicable law. Unless forfeited due to a Homeowner breach, Deposits shall be returned by the appropriate Service Provider or its subcontractor to the Homeowner as provided in any Subscription Agreement between the Homeowner and such Service Provider or its subcontractor, as provided in applicable tariffs or rate schedules, or as required by applicable law or rule.

Section 3.8 Corrections to Payments. If upon further review or audit LIM determines that the amount billed by it to the Association or paid by the Association was less than that required by this Agreement, then the Association shall pay such deficiency within sixty (60) business days of such determination. In the event that LIM is required by a determination of a regulatory agency, court or governmental body to charge an additional tax, fee or assessment to the Association, such tax, fee or assessment shall be included as a Regulatory Fee on future billings and the Association shall reimburse LIM if LIM is required to pay and/or collect such tax, fee or assessment for a prior time period (up to twelve (12) months), unless precluded by applicable law. In the event the provisions of this Section 3.8 apply, a revised statement shall be issued.

ARTICLE IV
TERM, BREACH, DEFAULT AND REMEDIES

Section 4.1 Term. This Agreement shall be effective as of the Effective Date and shall continue in force and effect for twenty-five (25) years, unless terminated sooner pursuant to the terms of this Agreement. This Agreement shall automatically renew for four successive ten (10) year periods, unless LIM provides notice to the Association of its decision not to renew at least six (6) months prior to the end of the then-current term. This Agreement may not have an aggregate term in excess of seventy-five (75) years.

Section 4.2 Default. The following actions shall constitute an event of default ("Event of Default") under this Agreement:

(a) Breach Notice. During the term of this Agreement, a Party ("Claimant") may assert that the other Party has committed a breach of the terms of this Agreement (a "Breach"), by providing a written notice detailing the nature of the Breach (the "Breach Notice") to the Party against whom the Breach is being claimed (the "Breaching Party").

(b) Cure Period. The Breaching Party shall have forty-five (45) calendar days from receipt of the Breach Notice to cure said Breach, unless the cure period for such Breach is otherwise established in this Agreement (the "Breach Cure Period")

(c) Dispute Notice. If the Breaching Party contests the validity of the Breach Notice, this Section 4.2(c) shall govern any such contest. The Breaching Party must contest the validity of the Breach Notice within ten (10) business days after receipt of the Breach Notice by providing written notice to Claimant regarding its intent to contest the Breach Notice (the "Dispute Notice"). No more than two (2) business days after the Dispute Notice is received by Claimant, representatives of the Breaching Party and Claimant shall meet at a mutually agreeable location to seek to resolve the dispute regarding the Breach. The representatives shall work diligently and in good faith for a period of up to thirty (30) business days after issuance of the Dispute Notice to seek agreement upon a resolution of the asserted Breach (the "Breach Resolution"). The Breach Resolution shall include a specific cure period for resolution of the asserted Breach ("Resolution Period"). If such dispute remains unresolved, the provisions of Section 6.1 provide the exclusive method of resolving such dispute.

Section 4.3 Rights and Remedies. If the Breaching Party does not cure the Breach within the Breach Cure Period, the Breach shall constitute an Event of Default. Upon an Event of Default, the non-defaulting Party shall be entitled to all damages, rights and remedies available, subject to Section 4.4, in a Dispute Resolution proceeding under Section 6.1 of this Agreement. The non-defaulting Party shall be entitled to all costs and expenses (including reasonable attorneys' fees, collections, service fees and other costs of collection) incurred in connection with enforcing its rights in a Dispute Resolution proceeding under Section 6.1 of this Agreement.

Section 4.4 Termination by the Association. If the Service Quality fails to meet the standards set forth in Section 2.3 for three (3) consecutive months, the Association may give LIM a Breach Notice of such circumstance pursuant to Section 4.2(c) and the procedures therein. Subject to Section 6.1 of this Agreement, within the Breach Cure Period, LIM, the appropriate Service Provider or its subcontractor may cure such Breach by improving the service to a level consistent with Section 2.3 of this Agreement. If LIM, the appropriate Service Provider or its subcontractor fails to do so during such Breach Cure Period, then, subject to the thirty (30) business day Breach Resolution period pursuant to Section 4.2(c), either Party may bring a Dispute Resolution proceeding pursuant to Section 6.1 of this Agreement for resolution of the dispute. No termination will be effective unless either the Arbitrator pursuant to Section 6.1 so rules or LIM accepts such termination notice by express written notice to the Association of its acceptance of termination.

Section 4.5 Suspension by LIM. If (a) the Association's payments to LIM pursuant to this Agreement are in arrears for more than sixty (60) days, (b) LIM has provided the Association with written notice of its intent to suspend the provision of Basic Services to all Homeowners (including to those who are current in their homeowner assessments) thirty (30) days after the date of such notice, and (c) the Association has not brought the arrearage current prior to the expiration of such thirty (30) day period, then the Basic Services may be suspended by LIM at any time, consistent with applicable law and rules regarding discontinuance of such Communication Services. Any such suspension of Basic Services may continue until such time as the arrearage has been brought current.

Section 4.6 Effect of Suspension, Termination or Expiration. Suspension, termination or expiration of this Agreement shall not affect the rights of either LIM or the

Association with respect to any claims or damages either shall have suffered as a result of any breach of this Agreement by the other, nor shall it affect the rights of LIM or the Association with respect to any liabilities or claims accrued, or based upon events occurring prior to the date of such suspension, termination or expiration. Upon suspension of this Agreement pursuant to Section 4.5, LIM or its subcontractors shall have the right to bill the Homeowners directly for Basic Services and to appoint a collection agent to collect the Basic Services assessments from the Homeowners.

Section 4.7 **Survival Upon Suspension, Termination or Expiration**. The covenants, representations and warranties provided in this Agreement shall survive the suspension, termination or expiration of this Agreement, and shall remain in full force and effect for a period of two (2) years following such suspension, termination or expiration.

ARTICLE V
COVENANTS, REPRESENTATIONS AND WARRANTIES

Section 5.1 **Covenants and Representations of LIM**. LIM covenants, represents and warrants as follows:

(a) Organization and Standing. LIM is a limited liability company duly organized, solvent, validly existing and in good standing under the laws of the Commonwealth of Virginia.

(b) Authorization and Binding Obligation. LIM has full limited liability company power and authority to enter into, deliver and fully perform this Agreement. This Agreement has been duly executed and delivered by LIM, and constitutes the valid and binding obligation thereof, enforceable against LIM in accordance with its terms, except to the extent such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditor's rights generally, and by the application of equitable remedies.

(c) No Prohibition on Performance. There exists no event or circumstance within the control of LIM or to the knowledge of LIM that precludes or prohibits LIM from performing its obligations pursuant to this Agreement.

Section 5.2 **Covenants and Representations of the Association**. The Association covenants, represents and warrants as follows:

(a) Organization and Standing. The Association is a non-stock corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Virginia.

(b) Authorization and Binding Obligation. The Association has full corporate power and authority to enter into, deliver and perform fully this Agreement. This Agreement has been duly executed and delivered by the Association, and constitutes the valid and binding obligation thereof, enforceable against the Association in accordance with its terms, except to the extent such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditor's rights generally, and by the application of equitable remedies.

(c) No Prohibition on Performance. There exists no event or circumstance within the control of the Association or to the knowledge of the Association that precludes or prohibits the Association from performing its obligations under this Agreement.

(d) Declaration. The Association covenants that the Declaration is a binding obligation of the Association and enforceable against the Association in accordance with its terms. The Association covenants not to amend the Declaration such that the amendment would (i) result in a termination of this Agreement or allow the Association to terminate this Agreement or (ii) have a materially adverse effect on LIM or its rights under this Agreement.

(e) LIM Affiliation with Developer. The Association acknowledges that LIM is an affiliate of Sandler at Brenneman Farm, L.L.C., the developer of the Development, and that LIM will receive compensation from the Association for its performance under this Agreement through the charges to the Association for the Basic Services.

(f) Deed of Easement Acknowledgment. The Association acknowledges and agrees that the Development is subject to the Deed of Easement and covenants that it will not take any action inconsistent with the terms of the Deed of Easement and the rights granted therein.

ARTICLE VI
GENERAL PROVISIONS

Section 6.1 Dispute Resolution. Wherever this Agreement requires the use of Dispute Resolution, the process contained in this Section shall be used. For purposes of this Section, the notice of dispute ("DR Notice") must be in writing and provided by means provided in Section 6.3. The notice shall specify the issues in dispute and the outcome desired by the Party giving such notice ("Noticing Party"). The Noticing Party shall file a request ("Request for Arbitration") with the American Arbitration Association ("AAA") to appoint an arbitrator with expertise in communications-related issues ("Arbitrator"). Each Party to the dispute will appoint an expert with knowledge of the subject matter of the dispute ("Party Experts") within thirty (30) days after the Request for Arbitration. The Request for Arbitration shall include a copy of this Section and a statement directing the Arbitrator to conduct the proceedings and render a decision consistent herewith. The Party Experts shall meet for a thirty (30) calendar day period (unrelated to Section 4.2(c)) commencing upon appointment of the Party Experts and (1) negotiate in good faith in an attempt to develop a consensual resolution, and (2) develop a position acceptable to each such Party as to the appropriate final resolution of the dispute ("Final Position"). If the dispute is still unresolved after such period, the Parties will, within thirty (30) calendar days after the conclusion of such period, submit their Final Positions in writing, with a written statement of reasons, to the Arbitrator and to all other Parties ("Submission"). The Arbitrator will then be required to render a final decision, with reasons stated. Failure to submit a Submission within the required time shall be deemed a waiver of such Party's right to submit a Submission, unless a late submittal is expressly permitted by all other Parties to the dispute. The Arbitrator's decision will be final and binding upon the Parties. Any arbitration decision shall include a written statement of the reasons. The Arbitrator may, in his or her discretion, convene one or more hearings, on no less than seven (7) business days written notice. Availability of discovery shall always be permitted under this Section 6.1. Any request for discovery shall be made at the time

of submittal of the Submissions, with reasons stated. Unless otherwise stated or modified, all other applicable rules of the AAA shall apply. The Arbitrator shall award costs, including attorney's fees, incurred in pursuing such Dispute Resolution in his or her discretion, in furtherance of Section 6.14 of this Agreement.

Section 6.2 **No Warranties; Limitation of Liability**. EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, LIM MAKES NO REPRESENTATIONS OR WARRANTIES – EXPRESS OR IMPLIED – REGARDING THE INFRASTRUCTURE OR THE COMMUNICATIONS SERVICES, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY DISCLAIMED. Neither Party will be liable to the other Party for any indirect, special, punitive or consequential damages, including, but not limited to, damages based on loss of service, revenues, profits, or business opportunities.

Section 6.3 **Notice**. Any notice, request, demand, report, consent or other document or instrument which may be required or permitted to be furnished to or served upon a Party hereunder shall be in writing which shall be personally delivered or sent by facsimile (with a duplicate copy sent by any other permitted method), telegram, cable or telex or deposited in the United States mail, registered or certified mail, return receipt requested, postage prepaid, addressed to the Party entitled to receive the same at its address set forth below (or such other address as such Party shall designate by notice to the other Party given in the manner set forth herein):

To LIM:

Lexington Infrastructure Management, L.L.C.
c/o L. M. Sandler & Son, Inc.
448 Viking Drive, Suite 220
Virginia Beach, Virginia 23452
Attention: Raymond L. Gottlieb
Facsimile: (757) 754-6401

With a copy to:

Faggert & Frieden, P.C.
222 Central Park Avenue
Suite 1300
Virginia Beach, Virginia 23462
Attention: Alan M. Frieden, Esquire
Facsimile: (757) 424-0102

To the Association:

Lexington Owners Association, Inc.
448 Viking Drive, Suite 220
Virginia Beach, Virginia 23452
Attention: Debra Dietz
Facsimile: (757) 498-6651

Such notice shall be effective, (i) if sent by facsimile transmission, when a facsimile confirmation of effective delivery is received or upon date of refusal or acceptance of delivery of the confirmation hard copy, whichever shall first occur, or (ii) if mailed or sent by courier, upon the date of delivery or refusal as shown by the return receipt therefor.

Section 6.4 Successors and Assigns. The Association may assign this Agreement, or any rights it may have, only after receiving the written consent of LIM. This Agreement shall be binding upon LIM and the Association and their respective successors in interest and permitted assigns.

Section 6.5 Further Assurances. Each Party agrees that it shall execute and deliver such further instruments, provide all information, and take or forbear from taking such further action and things as may be reasonably required or useful to carry out the terms, intent and purpose of this Agreement and as are not inconsistent with the terms of this Agreement, including, without limitation amending the Declaration from time to time to carry out the terms and intent of this Agreement.

Section 6.6 Governing Law. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the Commonwealth of Virginia without giving effect to the provisions, policies or principles to the conflict of laws.

Section 6.7 No Waiver. No failure or delay by a Party in exercising any default, right or remedy under this Agreement and no course of dealing between the Parties shall operate as a waiver of any such right or remedy. No single or partial exercise of any default, right or remedy by a Party under this Agreement precludes any other or further exercise of such default, right or remedy. The rights and remedies available to the Parties are cumulative and not exclusive of any other rights and remedies permitted by law or in equity.

Section 6.8 Severability; Compliance with Laws. The parties agree that the activities under this Agreement shall be subject to and comply with all applicable federal, state and local laws, regulations, codes, ordinances and administrative orders having jurisdiction over the parties, property or the subject matter of this Agreement. If any portion of this Agreement is declared invalid or unenforceable by a court or governmental authority of competent jurisdiction, this shall not affect the validity or enforceability of any remaining portion, which such remaining portion(s) shall remain in full force and effect as if this Agreement had been executed with the invalid or unenforceable portion(s) eliminated.

Section 6.9 Federal and State Regulations. Notwithstanding anything contained herein to the contrary, LIM shall not be required to perform any obligations under this Agreement if such performance would violate and federal or state law or regulation and LIM shall be allowed and required to perform all requirements specifically mandated by federal or state law or regulation.

Section 6.10 Force Majeure. Each Party shall have no liability to the others for any failure to perform its obligations hereunder, to the extent such failure is due to severe or unusual weather, an act of God, fire, strike (or other labor dispute), riot, act of terrorism, failure of

performance by a common carrier, failure of performance by a public utility, governmental action, vandalism or failure of performance by a Services Provider.

Section 6.11 Amendment; Entire Agreement. This Agreement represents the entire agreement of the parties with respect to the subject matter hereof and may be amended only by a written amendment executed by the undersigned parties. Notwithstanding the preceding sentence, any owners association or condominium association subject to the Declaration (a "Sub-Association"), without the execution of a written amendment by any other party, but by a joinder executed by such Sub-Association, may agree to become a party to and subject to this Agreement for the purposes of (i) acknowledging and agreeing to the terms and provisions set forth herein, (ii) agreeing to cooperate with the Association and all Service Providers attempting to carry out their responsibilities hereunder, (iii) acknowledging and agreeing that certain property of such Sub-Association (the "Sub-Association Property") may be subject to the Deed of Easement, (iv) agreeing to perform all duties and obligations, if any, applicable to the Sub-Association and/or the Sub-Association Property under this Agreement or the Deed of Easement and (v) engaging LIM as its exclusive agent to coordinate or arrange for, manage and monitor the provision pursuant to this Agreement of the Communications Services to Homeowners governed by such Sub-Association. All exhibits to this Agreement are intended to be attached to this Agreement and, whether or not so attached, are incorporated into this Agreement by reference as if set forth in full. Any addenda attached to this Agreement are incorporated into this Agreement by reference.

Section 6.12 Counterparts. This Agreement may be executed in any number of counterparts and each shall be considered an original and together they shall constitute one Agreement.

Section 6.13 Headings. All headings contained herein are for convenience only and have no legal meaning.

Section 6.14 Recovery of Costs. The prevailing Party in any litigation, proceeding or action commenced in connection with enforcing any of the provisions of this Agreement shall recover any and all legal expenses incurred in pursuing such litigation, proceeding or action from the non-prevailing Party.

Section 6.15 Interest. If, due to any circumstances whatsoever, at the time payment of any interest is due pursuant to this Agreement, the amount of such interest exceeds the limit currently prescribed by any applicable usury statute or law with regard to payments of like character and amount, then the amount of such interest shall be reduced to the amount permitted, so that in no event shall any payment of interest due in accordance with this Agreement exceed the amount of interest permitted.

Section 6.16 Day References. References to "business" days within this Agreement shall mean any day between and including Monday through Friday, but is not meant to include federal holidays that may fall on such day. Additionally, if the date of any notice required to be given or action to be taken hereunder falls on a weekend or federal holiday, such notice or action may be delivered or taken on the next business day. Unless specifically stated, references to "days" mean calendar days.

Section 6.17 **Confidentiality**. All documents and information exchanged between the Parties under this Agreement shall be held in confidence and solely for the purposes of implementing and enforcing this Agreement.

Section 6.18 **Recordation**. Any Party may record this Agreement or a memorandum of this Agreement among the land records of the applicable jurisdiction in which the Development is located and the Party requesting such recordation will pay the costs of such recordation. Upon the written request of any Party to execute such memorandum, all other Parties will promptly execute such memorandum and if any Party fails to promptly execute such memorandum, such Party appoints any other Party as attorney-in-fact to execute such memorandum.

[NEXT PAGE IS SIGNATURE PAGE]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the day and year first above written.

LEXINGTON INFRASTRUCTURE MANAGEMENT, L.L.C.,
a Virginia limited liability company

By: _____
Name: R. Gottlieb
Title: Manager

LEXINGTON OWNERS ASSOCIATION, INC.,
a Virginia non-stock corporation

By: _____
Name: Nathan D. Benson
Title: President

COMMONWEALTH OF VIRGINIA
CITY OF Va Beach, to-wit:

I, the undersigned Notary Public, in and for the jurisdiction aforesaid, do hereby certify that Raymond Gottlieb as Manager of Lexington Infrastructure Management, L.L.C., a Virginia limited liability company, whose name as such is signed to the foregoing Deed of Easement, appeared before me and personally acknowledged the same in my jurisdiction aforesaid, on behalf of the company.

GIVEN under my hand and seal this 28th day of December, 2005.

_____
Notary Public

My commission expires: 12-31-06

COMMONWEALTH OF VIRGINIA
CITY OF Va Beach , to-wit:

I, the undersigned Notary Public, in and for the jurisdiction aforesaid, do hereby certify that Thomas Benson as President of Lexington Owners Association, Inc., a Virginia corporation, whose name as such is signed to the foregoing Deed of Easement, appeared before me and personally acknowledged the same in my jurisdiction aforesaid, on behalf of the company.

GIVEN under my hand and seal this 28th day of December, 2005

Vicki L Runyan
Notary Public

My commission expires: 12-31-06

EXHIBIT A

DEED OF EASEMENT

[See attached]

PRIVATE EASEMENTS FOR THE EXCLUSIVE PROVISION OF COMMUNICATIONS SERVICES FOR LEXINGTON

THIS DEED OF EASEMENT (this "**Easement Deed**") is made this ____ day of December, 2005, by and between SANDLER AT BRENNEMAN FARM, L.L.C.., a Virginia limited liability company (along with any successors and assigns, "**Developer**" or "**Grantor**"), and LEXINGTON INFRASTRUCTURE MANAGEMENT, L.L.C., a Virginia limited liability company (along with any successors and assigns, "**LIM**" or "**Grantee**").

WITNESSETH:

WHEREAS, Developer is the owner and proprietor of certain real property in the City of Virginia Beach, Virginia (the "**Property**"), which is being developed as a residential development commonly known as "Lexington" (the **"Development"**), as more particularly described by the legal description attached hereto as Exhibit A; and

WHEREAS, Developer, as the master developer of the Development, wishes to provide a premier suite of communications services (the **"Communications Services")** for the benefit of the homeowners in the Development; and

WHEREAS, Developer anticipates that the Development will benefit from the availability of such Communications Services as a result of Developer negotiating on behalf of the Development as a whole; and

WHEREAS, Developer recognizes that a substantial initial investment will be required to create the infrastructure necessary to provide such Communications Services to the Development and that providing such Communications Services will require an extensive commitment by the provider of such services to the Development; and

WHEREAS, in order to facilitate such a substantial initial investment and the provision of such Communications Services, Developer is creating the rights and easements required for

the provision of such Communications Services to the Development and granting such rights and easements exclusively to LIM; and

WHEREAS, Developer intends that LIM will grant licenses and limited sub-easements concerning such rights and easements to the providers of Communications Services to the Development; and

WHEREAS, Developer anticipates that such service providers will provide such Communications Services to the Development by entering into contracts with LIM, Lexington Owners Association, Inc., a Virginia non-stock corporation (the "Association"), other owners associations, condominium associations and/or the homeowners in the Development to supply or provide such Communications Services; and

WHEREAS, Developer is the Declarant under the Declaration of Covenants, Conditions and Restrictions for the Development, as amended from time to time, that encumber the Property ("**CC&R's**"), and as such, intends that the portions of the Property to be conveyed to the Association pursuant to the CC&R's will be encumbered by the easements created pursuant to this Easement Deed; and

NOW, THEREFORE, in consideration of the premises and the sum of Ten Dollars ($10.00), cash in hand paid, receipt of which is hereby acknowledged, the parties hereby agree as follows:

1. The above recitals are incorporated herein by reference.

2. Grantor hereby grants, assigns, transfers, sets over and conveys specifically unto Grantee the following private blanket easements (each an "**Easement**") in, on, over and through the entire Property:

(a) Easements (each a "**Utility Easement**") for the purpose of constructing, installing, operating, maintaining, repairing, adding to, altering or replacing ("**Operate**" or "**Operation**") (i) antennae, satellite or terrestrial receiving or transmitting dishes, and communication towers, (ii) underground or above ground lines and cables (including but not limited to any type of lines and cables such as fiber optic cables or house connection lines required for telephone, Internet, video, television, cablevision and other related or accessory information communication facilities), and (iii) all above and below ground structures and appurtenances necessary for the collection, provision, distribution and transmission of video, telephonic, internet, data or information services, or other communications, data or media (collectively "**Utilities**"). All such equipment and facilities shall comply with applicable laws and regulations. Grantee shall not install Utilities without the approval of Grantor (during the period in which Grantor controls the Association) or the Association (after the termination of the period in which Grantor controls the Association), as applicable, regarding the location thereof, such approval not to be unreasonably withheld, conditioned or delayed. From time to time, as Grantor subdivides portions of the Property and/or as Grantee undertakes or completes installation of Utilities in a portion of the Property, Grantor and Grantee shall modify the blanket Utility Easement herein granted by entering into and recording in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia (the "**Land Records**") permanent private modifications of this Easement Deed (a "**Modification**") and related plats with respect to such portion of the Property in accordance with the terms hereof, specifying the specific length, width and location in which the Utilities will be physically located and contained (as approved by Grantor). As part of such modification of this Easement Deed, Grantee will prepare a plat showing the specific location in which the Utilities will be physically located and contained for

the review and approval of Grantor or Association, as applicable, and such plat will be recorded in the Land Records with each Modification. Such modification shall not affect this Easement Deed and the blanket easement conveyed hereby with respect to any other portion of the Property. Any such Modification and related plat specifying the areas in which the Utilities will be physically located and contained shall provide for the existence of house connection lines and that Grantee shall have the right to modify, install, move, relocate and/or create ("**Amend**") new easements reasonably required by Grantee to adapt or modify the Utilities to changes, advancements or evolutions in technology, equipment, facilities or the like ("**Advancements**") upon the approval of Grantor or Association, as applicable, such approval not to be unreasonably withheld, conditioned or delayed. If Grantor or Association, as applicable, fails to respond to any request by Grantee to Amend an easement to accommodate Advancements within thirty (30) days after such request, such request will be deemed approved. The contemplated containment of the area in which the Utilities will be physically located and contained by the approval and recordation of a Modification and related plat in accordance with the terms of this Easement Deed shall in no way change, reduce or modify (x) the perpetual nature of the Utility Easements and notwithstanding any such recordation of such Modification and related plat, nothing herein or therein will be deemed to grant any third party priority over the easements granted herein and (y) the rights of Grantee to exclusively Operate Utilities on, under and across the Property pursuant to Section 9 of this Easement Deed with respect to the entire Property.

(b) Non-exclusive easements (each an "**Access Easement**") for ingress and egress to the Utility Easements to the extent not reasonably accessible by public access easements and necessary to the Operation of the Utilities.

(c) Easements for signs related to the Operation of Utilities that have been approved by Grantor or Association, as applicable, as to form, content and location, such approval not to be unreasonably withheld, and that comply with applicable laws and regulations.

3. Any use or activity within the Easements, including installation of Utilities, shall not unreasonably interfere with the natural drainage or installed drainage system of the Property or the operation of any public utility systems installed within the Property and shall comply with all applicable laws and regulations.

4. All Utilities and appurtenant facilities that are installed or caused to be installed by Grantee in the Utility Easements shall be and remain the property of Grantee.

5. Grantee shall have all rights and privileges reasonably necessary for the full use of the Easements including the right to reasonable use of land or space immediately adjacent to an Easement that has been specifically located on a recorded plat, as contemplated by subparagraph 2(a) above; provided, however, that this right to use adjoining land or space shall be exercised only during periods of actual Operation, and further, this right shall not be construed to allow Grantee to erect any building, structure, fixture or other appurtenance of a permanent nature on such adjoining land or space.

6. Grantee shall have the right to trim, cut, and remove trees, shrubbery, fences, structures, or other obstructions or facilities in or near the Easements that interfere with the full use of the Easements for the purposes stated in this Easement Deed and the proper and efficient construction, operation, and maintenance of the Easements; provided, however, that Grantee, at its own expense, shall restore, as nearly as reasonably possible, reasonable wear and tear excepted, the premises to their original condition. Such restoration shall include the backfilling of trenches, the replacement of fences and landscaping, the reseeding or resodding of lawns or

pasture areas, and the replacement of structures, fixtures and other appurtenances located either inside Access Easements or outside the Utility Easements, but shall not include the replacement of structures, trees, or other facilities located within the Utility Easements.

7. Grantor, for itself and the Association, reserves the right to construct and maintain roadways, sidewalks, trails and fences over the Easements to the extent not prohibited or restricted by applicable laws and regulations and to make any use of the Easements for any purpose that is not inconsistent with, and will not impair, the rights herein conveyed to Grantee; provided, however, that Grantor shall not erect, and shall use its best efforts to cause Association not to erect, any building or other structure, excepting a roadway, sidewalk, trail and fence, within an Utility Easement without obtaining the prior written approval of Grantee, which approval shall not be unreasonably withheld or delayed.

8. As between Grantor, Association and Grantee, Grantee shall be responsible for maintenance of all Utilities located within the Utility Easements.

9. Grantor grants and conveys to Grantee the right to exclusively Operate and/or cause the Operation of Utilities on, under and across the Property such that no other person or entity shall be entitled to or have the right to Operate any Utilities on, under or across the Property without the written consent of the Grantee. Grantor covenants to Grantee that for the duration of this Easement Deed it shall not grant, and shall use its best efforts to cause the Association not to grant, any easement, license, right-of-way or similar right to use the Property to Operate any Utilities on, under or across the Property. Notwithstanding anything herein to the contrary, the containment of the blanket easements to specific areas accordance with Section 2(a) above will not affect the terms or be deemed to modify the terms of this Section 9, such that the right

granted under this Section 9 to exclusively Operate and/or cause the Operation of Utilities on, under and across the Property will remain in full force and effect.

10. Grantor will cause the Association to acknowledge and agree that the Property is subject to this Easement Deed and to covenant not to take any action inconsistent with the terms of this Easement Deed and the rights herein granted.

11. Notwithstanding the foregoing terms of this Easement Deed, subject to the terms of this Section 11, the Utility Easement specifically excludes and Grantor reserves the right to erect or use (independently or as part of another structure) one or more towers, monopoles or similar structures (collectively, "Poles") for the sole purpose of transmitting or distributing, or permitting third parties to transmit or distribute, wireless communication services ("Wireless Services") to the general public as part of a larger network of Poles for such Wireless Services provider; provided, however, Grantor's right to erect a Pole and provide Wireless Services to the general public hereunder does not include the right to erect or construct a Pole and/or use such Pole for the provision of Wireless Services solely and specifically to the Property (as compared to the general public). Nothing in this Section 11 shall be construed to allow or permit Grantor to grant easements, rights-of-way or similar rights to a Wireless Services provider or related party utilizing such Pole to Operate land-based Utilities from such Pole in, on and/or under the Property to one or more points, facilities or other Pole outside or within the Property.

12. The parties agree that the Easements are granted for commercial purposes, and it is the express intention of the parties that Grantee have the right, with the consent of Grantor (such consent not to be unreasonably withheld or delayed) (a) to transfer and/or assign, without limitation, all or any part of the rights, privileges, Easements and obligations granted by this Easement Deed to any third party and (b) to grant, transfer and/or assign to one or more third

parties sub-easements or licenses necessary to use such Easements in a manner consistent with Grantee's rights hereunder. The parties further agree that the Easements are perpetual unless terminated by an instrument, recorded in the Land Records and signed by all of the parties then holding an interest in the Easements.

13. This Easement Deed and the specific Easements granted herein shall be deemed private easements for all purposes, including without limitation, within the meaning of 47 U.S.C. Section 621, and any other law, regulation or judicial decision ("**Potentially Applicable Law**"). In addition, the Easements granted pursuant to this Easement Deed will not be, nor will they be construed to be for "compatible uses" within the meaning of Potentially Applicable Law.

14. This Easement Deed is made with the free consent and in accordance with the desire of Grantor.

15. Each provision of this Easement Deed shall be severable, and if for any reason any provision hereof is determined to be invalid and contrary to existing or future law, such invalidity shall not impair the operation or affect those portions of this Easement Deed which are valid, and this Easement Deed shall remain in full force and effect and shall be construed and enforced in all respects as if such invalid or unenforceable provision or provisions had been omitted.

16. Grantor (a) covenants to Grantee that Grantee shall have quiet enjoyment of the Easements and rights herein granted and (b) warrants that this Easement Deed is made and executed pursuant to authority properly granted by the applicable organizational and governing agreements or documents of such Grantor.

17. The Easements granted hereby are easements in gross, and run with the land affected hereby, for the benefit of Grantee and its successors and permitted assigns.

IN WITNESS WHEREOF, the parties have caused this Easement Deed to be executed, under seal by their duly authorized representatives.

DEVELOPER:

SANDLER AT BRENNEMAN FARM, L.L.C.,
a Virginia limited liability company

By: _____(SEAL)
Name: _____
Title: _____

COMMONWEALTH OF VIRGINIA)
) to wit
CITY OF _____)

I, the undersigned Notary Public, in and for the jurisdiction aforesaid, do hereby certify that _____, as Manager, of Sandler at Brenneman Farm, L.L.C., a Virginia limited liability company, whose name as such is signed to the foregoing Deed of Easement, appeared before me and personally acknowledged the same in my jurisdiction aforesaid, on behalf of the company.

GIVEN under my hand and seal this ___ day of _____, 200__.

_____
Notary Public

My commission expires: _____

[Additional Signature Pages Follow]

GRANTEE:

LEXINGTON INFRASTRUCTURE
MANAGEMENT, L.L.C.,
a Virginia limited liability company

By: _____(SEAL)
Name: _____
Title: _____

COMMONWEALTH OF VIRGINIA)
) to wit
CITY OF _____)

I, the undersigned Notary Public, in and for the jurisdiction aforesaid, do hereby certify that _____, as Manager of Lexington Infrastructure Management, L.L.C., a Virginia limited liability company, whose name as such is signed to the foregoing Deed of Easement, appeared before me and personally acknowledged the same in my jurisdiction aforesaid, on behalf of the company.

GIVEN under my hand and seal this ___ day of _____, 200__.

_____
Notary Public

My commission expires: _____

EXHIBIT A

Legal Description of Property

Those certain pieces or parcels of land situate, lying and being in the City of Virginia Beach, Virginia, known and designated as "PARCEL 5A," "PARCEL 5B," "PARCEL 5C" and "PARCEL 5D" as shown on that certain plat entitled, "SUBDIVISION OF LEXINGTON VIRGINIA BEACH, VIRGINIA," made by Rouse-Sirine Associates, Ltd., dated August 9, 2004, revised October 1, 2004 and recorded in the Clerk's Office of the Circuit Court for the City of Virginia Beach, Virginia as Instrument No. 200410190166991.

EXHIBIT B

FORM OF HOMEOWNER AGREEMENT

[See attached]

HOMEOWNER AGREEMENT

THIS HOMEOWNER AGREEMENT ("**Agreement**") describes certain billing and other arrangements relating to the Internet access, telephone, video, data and information services that are or will be provided to homeowners at Lexington ("**you**") in accordance with the Declaration of Covenants, Conditions and Restrictions (Lexington Owner's Association), as amended from time to time (the "**Declaration**").

1. **Basic Services Generally.** As a homeowner in (the "**Development**"), you will receive a number of services from Lexington Owners Association, Inc. (the "**Association**"). These services will be provided to you in accordance with the terms of the Declaration and they may include basic Internet, telephone and video services (the "**Basic Services**"). **The Basic Services are more fully described in the initial disclosure package that you received from the Association prior to signing your home purchase contract.** The Basic Services will be provided to you through a contract between the Association and Lexington Infrastructure Management, L.L.C. ("**LIM**"), entitled "Agreement to Obtain Communication Services", as such agreement may be amended and/or restated from time to time (the "**Association Contract**"). LIM, as agent for the Association, has arranged for the provision of the Basic Services to the Association and/or homeowners through arrangements with third party service provider(s) (each a "**Service Provider**").

2. **Premium Services.** You may receive information from Service Provider concerning premium video, telephone and Internet services (the "**Premium Services**") that are available from Service Provider. You are free to purchase or reject the Premium Services as you wish. Any Premium Services that you select will be purchased directly from Service Provider and the terms and conditions for these services will be set forth in a separate agreement between you and Service Provider.

3. **Billing.** To the extent provided through the Association, you will be billed for the Basic Services as part of the monthly fee that you are required to pay as a homeowner in the Development (the "**Association Assessments**"). The Association Assessments are more specifically described in the Declaration and are subject to change as provided in the Declaration. **PLEASE REMEMBER THAT YOU WILL BE REQUIRED TO PAY FOR THE BASIC SERVICES EVEN IF YOU DO NOT USE THEM.** Service Provider will bill you separately for the following, which are not covered by the Association Assessments: (1) installation and activation charges relating to the Basic Services, (2) equipment rentals and (3) all charges due in connection with any non-Basic Services, including Premium Services, that you elect to purchase from Service Provider (*see* Section 2). If the Association Contract is terminated for any reason, the Basic Services may continue to be provided to you and, as long as you do not elect to terminate those services, you will be responsible to pay for them directly.

4. **Acknowledgement.** By signing this Agreement, you acknowledge that:

(A) you have received prior notice of your obligation to pay for the Basic Services as that obligation is described in Section 3;

(B) you understand that LIM and Service Provider will incur significant costs to arrange for and coordinate the construction of a sophisticated network to provide Basic Services to the Development;

(C) you understand that LIM and Service Provider will incur additional costs to arrange for and coordinate the construction, operation and maintenance of this network;

(D) you understand that the real estate developer who is developing the Development holds an ownership interest in LIM;

(E) you agree that making the payments described in this Agreement and the Declaration will benefit you by making the network and the Basic Services available to you;

(F) you understand that the Basic Services may be purchased for you by the Association in the manner described in the Declaration and the Association Contract;

(G) in the event that you have problems with the Basic Services or the Premium Services, you should contact Service Provider or its designee directly to resolve those problems;

(H) any equipment provided by Service Provider or its designee such as software and external wiring and related electronic and optical equipment installed by Service Provider up to the point where the wiring enters your residence ("Service Provider Equipment") will at all times remain the property of Service Provider or its designee. You agree not to use the Service Provider Equipment for any purpose other than to use the Basic Services pursuant to this Agreement. You agree that the Service Provider Equipment will not be serviced by anyone other than Service Provider employees or agents. You will not sell, transfer, lease, encumber or assign all or part of the Service Provider Equipment to any third party. You will not relocate the Service Provider Equipment.

(I) Service Provider and its employees, agents, contractors and representatives are authorized to enter your residence in order to install, maintain, inspect, repair and remove the Service Provider Equipment and any

equipment used in connection with the services provided by you. All such access will occur at a time agreed to with you;

(J) you understand that Service Provider will have no direct legal obligations to you with respect to the Basic Services;

(K) you agree to notify any future purchaser of your home or lot in the Development of the fact that Basic Services may be provided by the Association pursuant to the Declaration, fees for these services are included as part of the Association Assessments and that these payments must be made even if the purchaser does not use the Basic Services;

(L) you have the option to obtain any services (including Basic Services) from any other provider serving the Development, but selecting another provider and discontinuing use of all or any portion of the Basic Services will not relieve you from your obligation to pay for the Basic Services as part of your Association Assessments in accordance with Section 3; and

(M) LIM is not a provider of regulated telecommunications or cable television services, and is not a regulated public utility in the Commonwealth of Virginia.

5. **Special Provision Relating to Video Services.** The Basic Services may not include digital video services or any digital converters. If you want to receive digital video services on one or more television(s) and if such television(s) are not "digital cable ready," you may need to rent digital converters from Service Provider or its designee to receive digital video services. This rental will be provided at Service Provider's or its designee's then-current rates and on Service Provider's or its designee's then-current terms and conditions (*see* Section 3). If you sell your home, you must return all digital converters (including any rented converters) and other equipment prior to the sale.

6. **Special Provisions Relating to Internet Services.**

6.1. The Basic Services include Internet access services ("**Internet Services**"). To use the Internet Services, your computer must possess certain minimum technical specifications. Service Provider may change these specifications from time to time by providing you with advance written notice.

6.2. Your use of Internet Services will be subject to Service Provider's acceptable use policy. Service Provider may change this policy from time to time by providing you with advance written notice.

7. **Privacy.** Applicable federal regulations restrict the ability of cable television companies to use, disclose or give other parties access to customer proprietary network information ("CPNI"). CPNI is the information a cable television company may obtain from your use of telecommunications services including items such as the technical configuration of your services, the type of services that you use, the amount of services that you use and the destination of your calls. By signing this Agreement, you agree to waive applicable CPNI or other privacy restrictions and you authorize Service Provider or its designee to use your CPNI to market additional services to you. You can revoke this waiver at any time by providing written notice to Service Provider and/or its designee, as appropriate.

8. **Indemnity.** You will indemnify and hold harmless Service Provider, its designees, LIM, the Association, each owners association or condominium association subject to the Declaration , the real estate developer who is developing the Development and their respective affiliates, agents, employees, officers or directors (collectively, the **Indemnified Parties**") against claims (including, but not limited to, claims for damage to any business or property, or injury to, or death of, any person), actions, damages, liabilities, costs, and expenses (including, but not limited to, reasonable attorney's fees) caused by or resulting from any act or omission by you or your contractors, agents, employees or invitees in connection with the Basic Services and Premium Services and/or the facilities and equipment used in connection therewith (collectively, the "**Services**").

9. **Limitation of Liability.** The liability of the Indemnified Parties for damages of any nature arising from errors, mistakes, omissions, interruptions, or delays of any Indemnified Party, or their respective contractors, agents, or employees (collectively, "**Agents**") in the course of establishing, furnishing, rearranging, moving, terminating or changing the Services will not exceed an amount equal to the amounts paid by you for the applicable Service (calculated on a proportional basis where appropriate) during the period during which such error, mistake, omission, interruption or delay occurs. The Indemnified Parties will not be liable for any failure of performance if such failure is due to any cause or causes beyond the reasonable control of the Indemnified Parties and these causes will include, but are not limited to, acts of God, fire, explosion, vandalism, cable cut, any act of a civil or military authority, terrorism, labor difficulties, supplier failures, and national emergencies. The Indemnified Parties will also not be liable for any failure of performance if you fail to notify them of such failure of performance within thirty (30) days after you become aware of such failure of performance. The Indemnified Parties will not be liable for interruptions, delays, errors, or defects in transmissions or for any injury whatsoever, caused by you, or your Agents or invitees or by facilities or equipment provided by you or on your behalf. In no event will the Indemnified Parties be liable for any incidental, indirect, special, or consequential damages (including lost revenue or profits) of any kind whatsoever regardless of the cause or foreseeability of those damages. When the services or facilities of other communication carriers are used separately or in conjunction with the facilities used to provide the Basic Services, the

Indemnified Parties will not be liable for any act or omission of such other common carriers or their Agents.

10. **Miscellaneous.** This Agreement may be amended only by a written amendment executed by all of the parties to this Agreement (each, a **"Party"** and collectively, the **"Parties"**). No failure or delay by any Party in exercising any right or remedy under this Agreement and no course of dealing between the Parties shall operate as a waiver of any right, except as otherwise provided herein. No single or partial exercise of any right or remedy by any Party shall preclude any other or further exercise of such right or remedy, except as otherwise provided herein. If any portion of this Agreement is declared invalid or unenforceable by a court or governmental authority of competent jurisdiction, this shall not affect the validity or enforceability of any remaining portion, which such remaining portion(s) shall remain in full force and effect as if this Agreement had been executed with the invalid or unenforceable portions(s) eliminated. This Agreement will be binding upon the Parties and their respective successors in interest and permitted assigns. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the Commonwealth of Virginia without regard to the conflict of law provisions thereof. This Agreement may be executed in any number of counterparts and each shall be considered an original and together they shall constitute one agreement.

In consideration of the promises and the mutual covenants and agreements contained in this Agreement and the Declaration, and intending to be legally bound hereby, the parties listed below execute this Agreement as of the day written below, with the intent and expectation of being legally bound hereby.

LEXINGTON OWNERS ASSOCIATION, INC.,
a Virginia corporation

By: _____
Name:
Title:

HOMEOWNER(S)

By: _____
Name:
Date:

By: _____
Name:
Date:

5297\003\Homeowner Agreement-clean (12-21-05).DOC

Enclosure (2)

castroma

From: "castroma" <[redacted]>
To: [redacted]
Sent: Friday, January 04, 2008 10:00 AM
Subject: Re: Complaint Report

Ms. Clarke,

I would like to know if the SCC is going to leave my inquiry to COX open?

Respectfully,
Marilyn Castro

----- Original Message -----
From: castroma
To: [redacted]
Sent: Tuesday, December 25, 2007 5:30 PM
Subject: Re: Complaint Report

Ms. Clarke,

COX's letter does not answer my inquiry. This letter is an answer from the developer lawyer in COX letterhead. .

The process explained by the developer's lawyer in COX letter was not followed. I never signed the Homeowners Agreement as they state. The 25 years communications Service agreement was never properly disclosed. The references to the communications agreement contract number were incorrect. The answer provided by Cox and developer lawyers is a real state law issue. We have address this issue with the developer in a separate inquiry.

My question remains; Why I'm not protected by the Virginia Telecommunication Bill of rights and the Cable Act , specifically:
Select and keep the telecommunication provider of my choice.
Honest and accurate sales and service information.
Accurate and understandable billing under the Virginia Telecommunication Bill and the Cable Television Consumer Protection and Competition Act of 1992 section 14.

I asked these question to the SCC, COX and the developer and none had being answered. It is very disturbing COX has asked the developer lawyer to answer my inquiry. It is even more disturbing that 2 companies and their lawyers got together to derail the questions. The fact that they avoided answering the questions, lead me to believe that there may be validity to my concerns.

Every month I receive a bill from COX with itemize phone services the amounts are set to $0.00 this is in direct contradiction with the 1992 Cable law sec 14. May you clarify the applicability of these laws to developers and communications providers or is there a whole area of telecommunication in Virginia, without any regulation? Please leave my complaint open until a satisfactory answer to my questions is received.

Respectfully,
Marilyn Castro
[redacted]

castroma

From: "castroma" [redacted]
To: "Larry Kubrock" [redacted]
Cc: <CMOffice@vbgov.com>; <anna.clarke@scc.virginia.gov>; <mail@oag.state.va.us>; <REBoard@dpor.virginia.gov>
Sent: Friday, January 11, 2008 5:08 PM
Attach: FCC Ruling letter.doc; SCC Answers to questions.doc; cox response.pdf; RE_ Homeowners Agreement Document.eml; cox statement.pdf; Re_ Complaint Report.eml; Virginia Telecommunication Bill of Rights.pdf; Code of Virginia 55-79.74.pdf; Master Communications Easement.pdf
Subject: Re: Telephone service

Mr. Kubrock

Enclosed you will find the letter with answers to your questions. If you have any questios please don't hesitate in contact me.

Thank you,
Marilyn Castro

---- Original Message ----
From: Larry Kubrock
To: [redacted]
Sent: Thursday, January 10, 2008 4:05 PM
Subject: Telephone service

January 10, 2008
Ms. Castro,
Anna Clarke asked me to look into the problem that you are having getting the company of your choice for your telecommunication services. Anna was trying to find a way to resolve this but to date with no acceptable solution. If you have few minutes, I would like to talk with you or if you could provide me with additional information on the development by email it may help. I need answers to questions like; is the property a gated community with private streets? Are the streets City of Virginia Beach owned and maintained? Is the property a condo? If it is a condo will the POA place an entrance conduit to allow access to the wiring closet for a second service provider? Does the property owners association own the common areas where another service provider would need to secure rights of way to place cable and conduits? How far is it to the nearest Verizon facility. What is the name of the development? I will be glad to research this on your behalf to see if we can assist with a resolution. If you would call me at either 800-552-7945 and select the Division of Communications or send me an email with these details I will begin my investigation. From the emails that I read it must be more to the story than I have in the file. While Ms. Clarke is usually the best at resolving customer complaints I will be glad to review all the details to see if I can find anything that may have been overlooked.

Larry Kubrock
Senior Telecommunications Specialist
Division of Communications
State Corporation Commission
[redacted]

[redacted] & Marilyn Castro
[redacted]

January 11, 2008

To: State Corporation Commission
Division of Communications
P.O Box 1197
Richmond, Virginia 23218
Attn: Larry Kubrock
Senior Telecommunications Specialist

RE: Telephone Services

These are answers to the questions on your e-mail dated 10 Jan 2008:

a) Is the property a gated community with private streets?
Answer: No, we don't have gates, Yes, our streets are private.

b) Are the streets City of Virginia Beach owned and maintained?
Answer: No.

c) Is the property a condo?
Answer: Yes.

d) If it is a condo will the POA place an entrance conduit to allow access to the wiring closet for a second service provider?
Answer: Unknown, to answer this question you would need to see the contract between Cox Communication and the Lexington Infrastructure Management (LIM). This was the special purpose entity created by the developer to retain control of the communication infrastructure after the period of developer control. We were denied copies of this contract.

e) Does the property owners association own the common areas where another service provider would need to secure rights of way to place cable and conduits?
Answer: No

f) How far is it to the nearest Verizon facility?
Answer: Verizon just ran fiber around the perimeter of our property. They also have a cellular tower within our property. It is interesting to note that Verizon fiber service around my complex was done without using exclusive or bulk billing agreements.

g) What is the name of the development?

Answer: Bluegrass Park at Lexington in the City Of Virginia Beach.

I have enclosed a document from Broadband Properties Title Master Communications Easement in the Fiber Age as enclosure (1). This document discloses the complexity of the legal arrangements to create "wire communities" and is similar to what the developer L.M. Sandler and Sons put in place in my community. This document shows the developer how to maintain control, increase profit and avoid as many laws and regulation as possible. It also states how to lock-out or disincentive other service providers. Couple with faulty disclosure and contract procedures the consumer stands no chance against these practices. This document shows clear intend to prevent competition, which I believe is one of the charters of the State Corporation Commission, Communications Division.

In my particular case, I am bound by a Communications Agreement for cable, telephone and internet services between Lexington Homeowners Association and the Lexington Infrastructure Management. This contract is for a term of 25 up to 75 years. Lexington Infrastructure Management is a company owned by the developer L.M. Sandler and Sons LCC. The Lexington Homeowners Association is also controlled by L.M. Sandler until the end of declarant control period. This contract was placed into effect before most homeowners moved in and during the period of developer control. This contract binds all homeowners to pay $145.00 per month for Communications Services as part of you homeowners assessments. *Other communication providers can be contracted by the homeowner, provided the homeowners still pay the $145.00 monthly fee to the association.* A significant finding is that Virginia Condominium Code 55-79.74 controls the length of contracts entered during the period of declarant control, which in no case should exceed 2 years. The Virginia Condominium Code 55-79.74 is attached as enclosure (2). Homeowners would have to take the developer to court in order to invalidate these contracts. It is my opinion that for middle and low income families the option of lengthy and costly court litigation with the developer is not attainable.

Under these exclusive contracts the goals of the Virginia Telecommunication Bill of Rights could never be attained. Customer will never be able to chose among providers or have a clear and understandable phone bill. The Cable Television Consumer Protection and Competition Act of 1992 Sec 14, details that cable billing should be itemized.

I have never received an itemized cable or phone bill from my association and even when Cox sends me a bill every month all items are set to $0.00, except for $1.86 that I pay Cox to keep my phone number private. This is in direct contradiction to the Cable Act of 1992 and the Virginia Telecommunications Bill of Rights. I have attached a Cox Account Statement as enclosure (3) and the Virginia Telecommunications Bill of Rights as enclosure (4).

As a paying customer I don't know the itemized value of telephone, internet or cable. I also don't know who profits from this contract. I requested a copy of the contract between the Lexington Infrastructure Management and Cox Communication. This contract information was denied and hence I have no idea of the level of service and contract clauses that control the services that I pay for every month. I think the Communications Division should get a copy of the Contract between the Cox and the Lexington Infrastructure Management to clarify once and for all the truth behind this issue.

Private Cable Operators (LIM) appear to be exempted from all these requirements. In the case of the enclosed Cox letter, when faced with billing questions based on the Cable Act and Virginia Bill of Rights, Cox Communications and L. M. Sandlers Lawyers drafted a totally unrelated response avoiding the issue altogether, and claiming that the developer properly effected and disclosed the contract. I have attached the Cox letter as enclosure (5).

The way these contracts are placed in effect also raises questions. In my particular case critical documents on the disclosure were improperly referenced and contract procedures were not followed.

On the issue of disclosure, clause (m) of the Non Binding Reservation Agreement To Become a Binding Purchase Agreement referenced a contract Title "Agreement To Obtain Communication Services" with Instrument Number 20060126000139260. Instrument Number 20060126000139260 is not the "Agreement To Obtain Communication Services" but rather the "Declaration of Protective Covenants and Restrictions". Instrument Number 20060126000139260 reference a "Communications Service Agreement" but there are no instrument numbers attached to this reference. Since the contract was not properly reference, it was not disclosed.

The procedure to effect the "Agreement To Obtain Communication Services" as explained by Carol Hahn Esq. in the Cox Communications Letter mention that the "Communications Service Agreement" was received as part of the disclosure package. The "Communication Agreement" was not enclosed in the disclosure package. Further, she mentions that each homeowner signed a "Homeowners Agreement". I have asked the closing agent for copy of the Homeowners Agreement but they can't find it. Enclosure (6) is the Equity Title e-mail that mentions the developer don't have the signed Homeowners Agreement.

This privatization of cable and telephone services will surely impact important laws and financial aspects of the state. As these practices become more prevalent and more of these services become "private" the Bill of Rights, franchises and other communication state laws will become void and communications providers will become deregulated, voiding the need for a Communication Division at State Corporation Commission. Also there are multiple taxes that are applied to communications services, via the customer end user tax, communication tax and franchise fees etc, it is unknown how a private cable operator will tax and if those taxes would fill the same purposes as communication taxes.

Enclosures (7) and (8) are previous communication with the SCC in which some of these questions and issues were addressed.

Thank You,

Marilyn Castro

Enclosure: (1) Master Communications Easements in the Fiber Age
(2) Virginia Condominium Code 55-79.74
(3) Cox Account Statement
(4) Virginia Telecommunications Bill of Rights
(5) Letter RE: Marilyn Castro Customer ID: Cast2261
(6) Equity Title E-mail RE: Homeowners Agreement
(7) Letter RE: Exclusive Service Contract for Provision of Video Services in Multiple Dwelling Units and Other Real State Developments MB Docket No. 07-51
(8) Prior SCC E-Mail Complaint Report.

Enc. (1)

Master Communications Easements in the Fiber Age

This approach maximizes developer rights while providing incentives to build fiber

By Jeffry L. Hardin and James N. Moskowitz ■ *Fleischman and Walsh, L.L.P*

Access to the latest broadband services is quickly becoming a necessity for new homebuyers. As a direct result, many new homebuyers now consider availability of these services when making home buying decisions.

In the past, when telephone and video services were fairly standard, developers gave little thought to what communications services might be available in their new housing developments. Today, meeting the expectations of increasingly tech-savvy homebuyers requires that developers ensure that advanced broadband services are available in their new developments. It is for this reason that more and more new residential communities in the United States include fiber-to-the-home (FTTH) communications solutions as an amenity.

The successful implementation of a FTTH (or "wired community") arrangement almost inevitably requires that the developer retain control over access to the community by communications service providers. Controlling access allows the developer to offer exclusive arrangements to service providers. That's an incentive for them to construct state-of-the-art fiber facilities and to deliver the latest fiber-enabled voice, video, Internet, and home monitoring services.

A Master Communications Easement (or "MCE") arrangement also allows the developer to obtain these services in bulk for the community as a whole on terms that are more favorable to the residents than the residents individually could achieve. This is because the selected services provider is assured of a higher customer take rate that will generate a revenue stream sufficient to justify lower prices to residents while also covering the significant up-front costs inherent in deploying fiber facilities.

This prospect of high penetration is often the only economically feasible way to support the capital investment necessary to construct and operate a state-of-the-art FTTH communications infrastructure.

Developers and property owners can retain control over access to their communities through the use of a MCE. This article will explain the usual elements of a MCE, describe how one typically creates a MCE, and provide a brief outline of some of the recurring strategic and legal issues associated with using a MCE in a wired community arrangement.

The Basics of the Master Communications Easement

The MCE is a private easement (actually a bundle of several easements) that authorizes both the installation of communications infrastructure within a new housing or multi-family development and the provision of communications services to homeowners. The MCE typically is exclusive, where permitted under state law. This means that communications facilities and services can only be provided on the property with the express consent of the holder (or grantee) of the MCE. Because a MCE limits service provider access to the community, the penetration or market share of the preferred service provider is likely to be quite high if not 100 percent.

This prospect of high penetration is often the only economically feasible way to support the capital investment necessary to construct and operate a state-of-the-art FTTH communications infrastructure. Absent the availability of preferential or exclusive access by a service provider to the development, such infrastructure might not be deployed in many instances. A MCE also better positions the developer to receive compensation from the selected service provider for providing the preferential or exclusive right to serve the community.

When drafting a MCE, it is important to preserve the distinction between the communications infrastructure (*i.e.*, the plant in the ground) and the services provided *over* that infrastructure. This preserves the greatest amount of flexibility in structuring wired community transactions.

The developer usually wants to strictly limit the ability of service providers to retrench or dig up the roads in order to install new infrastructure.

but often is more open to having multiple providers of services share the infrastructure that already is in place.

Distinguishing between communications infrastructure and the services provided over that infrastructure also permits possibly billing for the use and enjoyment of the infrastructure separately from charges for the communications services.

In any event, these distinct rights should, at a minimum, be taken into account when developing a wired community strategy that involves a MCE.

It also is advisable to define "communications infrastructure" and "communications services" broadly enough to future-proof the MCE. While somewhat circular, "communications infrastructure" should be defined to include the tangible personal property related to the provision of "communications services." For its part, "communications services" should be defined to include (in addition to voice, video, Internet and security services) other communications, data and information services that can be provided over the communications infrastructure.

The stated purposes of the MCE should include, in addition to the obvious purposes of installing and maintaining communications infrastructure, the marketing and provision of communications services within the community and the use of the communications infrastructure to serve end users located *outside* of the community.

Multiple Easements within the MCE

The MCE typically grants several easements over the property. While at times this may seem redundant, these easements serve separate legal purposes. An all-encompassing "blanket" easement covering the entire property gives the developer and the selected services provider maximum flexibility for locating the communications infrastructure, while also precluding unauthorized provision of communications services anywhere in the community. A "perimeter" or "moat" easement around the inside boundary of the property typically also is included in the MCE. The perimeter easement effectively seals off the community from unauthorized access by other service providers.

The developer usually wants to strictly limit the ability of service providers to retrench or dig up the roads in order to install new infrastructure, but often is more open to having multiple providers of services share the infrastructure that already is in place.

It also is advisable for the MCE to grant a "common area" easement with respect to any existing or future common area or common property that has been or may be conveyed to the homeowners association for the community. Depending on when the MCE is granted, the HOA for the community sometimes must join in the grant of the MCE to cover common property previously conveyed to the HOA. If the MCE is granted before the HOA is formed or before it assumes control over any common property, then the HOA's title to the common property will be encumbered by the previously granted MCE. In addition to these three easements, a specific "access" easement for ingress and egress at the property also is included in the typical MCE.

A sometimes-contentious easement often included in the MCE relates to the granting of a private easement within any road, street or highway within the community and the continuation of such private easement following the public dedication of such roadway or any public right-of-way. The dedication process itself should not negate any pre-existing private easement in the roadway or right-of-way to be dedicated.

Under this approach, the public authority receives the dedicated roadway or right-of-way subject to the pre-existing private easement. This also preserves the ability of the holder of the private roadway easement to take the position that its communications infrastructure located under the public roadway or within the area subject to the public right-of-way is actually within its private easement. This can be useful when trying to avoid obtaining a video franchise to provide services in the development.

Before deciding to create a private communications easement in roads or rights-of-way that are to be dedicated to the public use, there are a number of considerations that should be taken into account. For example, local franchising authorities sometimes require a wired community provider that is offering video services to obtain a franchise, even if it holds a pre-existing private easement within the public right-of-way. (Under federal law, local franchising authorities are permitted to require that video service providers obtain a franchise to locate communications infrastructure in the public right-of-way.)

In addition, local authorities who are unfamiliar with having private easements embedded in a dedicated roadway or public right-of-way sometimes threaten to delay the dedication in order to review the legalities of the private roadway easement. Developers typically want to avoid any delay in dedication because it also delays their ability to sell lots in the development.

As a consequence, the roadway ease-

ment provisions sometimes are redrafted or even deleted in order to placate the local authorities and avoid these delays. Of course, elimination of the private roadway easement may result in the need for the selected video services provider to apply for a local franchise.

Creating A Master Communications Easement

It is imperative that the developer or property owner takes steps during the initial planning of the development to preserve its ability to grant a MCE. The plat for the property should expressly state, in clear and unequivocal language, that any public utility easements or public rights-of-way designated on the plat are only for use by public service companies and that telecommunications services providers may access the property only pursuant to a private easement granted by the property owner.

The property owner also should limit the scope of any utility easement to the specific utility service being provided by the company obtaining the easement (such as power, gas or water) and expressly preclude use of such public utility easement for communications services.

Recent court decisions in several states, including Florida, Georgia and Washington, support the notion that public utility easements are available for the transmission of communications services by public service companies or by third party communications service providers unless the easement expressly restricts such use. In addition to restricting the use of utility easements, the plat also should affirmatively state that the property owner reserves for itself the exclusive right to authorize both the installation of communications infrastructure and the provision of communications services within the property.

In addition to the plat, the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") for the development also should expressly permit the creation of a MCE. It also should expressly authorize the developer to arrange for the installation of communications infrastructure and the provision of communications services to the community.

Under this approach, the public authority receives the dedicated roadway ... subject to the pre-existing private easement. This ... preserves the ability of the holder of the ... easement to take the position that its communications infrastructure located under the public roadway ... is actually within its private easement. This can be useful when trying to avoid obtaining a video franchise.

To this end, it is advisable to adopt language in the CC&Rs that is generic in nature. This allows the developer to maintain maximum flexibility regarding the structuring of wired community arrangements. It also allows for changes in law and other circumstances.

Finally, the developer usually needs to obtain its lender's consent to the creation of the MCE. The lender also should confirm that the MCE and any sub-easements or licenses granted thereunder will not be subject to the lender's mortgage on the property, or at least will not be disturbed by the lender if it forecloses or otherwise exercises its rights under the mortgage.

Granting a MCE

Once the proper groundwork has been laid, the next step is for the developer or property owner to grant a MCE. One approach often taken in wired community arrangements involves the developer granting the MCE to a wholly-owned special purpose entity ("SPE"), formed to act as the communications gatekeeper for the community. Having the developer's SPE hold the MCE allows the developer to continue managing the relationships with the selected service providers, even after the developer turns over management of the community to a homeowners' association or similar organization.

This step also moves the legal and contractual issues associated with a MCE away from the property owner, which often also is a special purpose entity of the developer formed for the purpose of acquiring and developing the property. Instead, the MCE is held by a separate entity whose existence and financial future is separate, to a certain extent, from that of the property owner and the developer.

A MCE granted by a developer to its SPE usually is exclusive and perpetual. It also expressly provides for the subsequent grant by the SPE of sub-easements and licenses (exclusive or non-exclusive; perpetual or limited in duration) to owners of the communications infrastructure and providers of the communications services at the property.

There are a few states that regulate the ability of landowners to enter into exclusive arrangements with communications providers for services to new housing developments. When the developer grants the MCE to its special

purpose entity, there are ways for a MCE to be exclusive without running afoul of these state laws.

One way to achieve this is by structuring the wired community arrangements so that the SPE is not the owner of the communications infrastructure or the provider of the communications services. Instead, the SPE in turn grants *non-exclusive* sub-easements or licenses to the owners of the communications infrastructure and/or providers of services.

Notwithstanding the non-exclusivity of such sub-easements and licenses, even a properly structured non-exclusive wired community arrangement usually results in other service providers opting to forego spending capital dollars to wire a community that already is receiving fiber-enabled services at rates that are usually lower than otherwise available at retail.

Third-Party Access to Wired Communities

During the earliest stages of developing a wired community strategy, developers and service providers should consider making provisions for allowing other third party providers to obtain access to the community. There are a number of reasons for this. The developer (or later, the HOA) simply may want to give residents in the development a choice of different providers. Or the developer may want to preserve the option of bringing in a third party provider if the initial selected provider proves unable to deliver the services, affordability, or level of quality that the residents require.

In addition, creating contingencies for providing future third party access should preserve the wired community structure in the event that there is some shift in state or federal policy that affects the rights of developers and/or service providers to enter into exclusive or preferred provider arrangements.

In order to provide a means for third party access within the wired community arrangement structure, it is advisable to require the holder of the MCE or a sub-easement granted under it to provide access, on just and reasonable rates, terms and conditions, to any qualified third party provider that requests access.

Such access can be granted by allowing the use of the existing communications infrastructure or by granting a license to use the easements. The rates and terms for third party access need not be spelled out in advance, but can be left for future good faith negotiations by the holder of the MCE or sub-easement and the third party service provider.

The likelihood of another communications service provider paying even minimal amounts for access to a community that already is receiving fiber-enabled services at bulk service rates is somewhat remote, given the current economics of the industry.

Conclusion

The MCE is one of several sophisticated legal arrangements that lead to a successful wired community arrangement for a master planned residential community. Proper planning for, and recordation of, a well crafted MCE preserves the developer's right to control access to the community by communications services providers. It also helps support the financial decision to commit capital dollars to the build out of a fiber communications infrastructure in the community. As such, MCEs are an invaluable tool for ensuring that the latest suite of broadband services is available to new homebuyers, especially in a more remotely located new housing development. **BBP**

About the Authors

Jeffry Haskin is a partner in the corporate group and James Moskowitz is an associate in the telecommunications group at the law firm of Fleischman and Walsh, L.L.P., located in Washington DC.

Enc. #2

receive notice of proposed amendments to the bylaws and receives no written objection to the adoption of the amendment from the mortgagee within sixty days of the date that the notice of amendment is sent by the association, unless the bylaws expressly provide otherwise. If the mortgagee has not supplied an address to the association, the association shall be deemed to have received the written consent of a mortgagee if the association sends the text of the proposed amendment by certified mail, return receipt requested, to the mortgagee at the address filed in the land records or with the local tax assessor's office, and receives no written objection to the adoption of the amendment from the mortgagee within sixty days of the date that the notice of amendment is sent by the association, unless the bylaws expressly provide otherwise.

B. Subsection A shall not apply to amendments which alter the priority of the lien of the mortgagee or which materially impair or affect the unit as collateral or the right of the mortgagee to foreclose on a unit as collateral.

C. Where the bylaws are silent on the need for mortgagee consent, no mortgagee consent shall be required if the amendment to the bylaws does not specifically affect mortgagee rights.

(1993, c. 1; 1998, c. 32.)

§ 55-79.74. Control of condominium by declarant.

A. The condominium instruments may authorize the declarant, or a managing agent or some other person or persons selected or to be selected by the declarant, to appoint and remove some or all of the officers of the unit owners' association and/or its executive organ, or to exercise powers and responsibilities otherwise assigned by the condominium instruments and by this chapter to the unit owners' association, the officers, or the executive organ. The declarant or the managing agent or such other person or persons selected by the declarant to so appoint and remove officers and/or the executive organ or to exercise such powers and responsibilities otherwise assigned to the unit owners' association, the officers, or the executive organ shall be subject to liability as fiduciaries of the unit owners for their action or omissions during the period of declarant control as specified in the condominium instruments or if not so specified, within such period as defined in this section. But no amendment to the condominium instruments shall increase the scope of such authorization if there is any unit owner other than the declarant, and no such authorization shall be valid after the time limit set by the condominium instruments or after units to which three-fourths of the undivided interests in the common elements appertain have been conveyed, whichever occurs first. For the purposes of the preceding sentence only, the calculation of the fraction of undivided interest shall be based upon the total undivided interests assigned or to be assigned to all units registered with the Real Estate Board pursuant to subsection B of § 55-79.92 hereof and described pursuant to subdivision (4) of subsection (a), subdivision (2) of subsection (b), or subdivision (8) of subsection (c), of § 55-79.54. The time limit initially set by the condominium instruments shall not exceed five years in the case of an expandable condominium, three years in the case of a condominium (other than an expandable condominium) containing any convertible land, or two years in the case of any other condominium. Such time period shall commence upon settlement of the first unit to be sold in any portion of the condominium.

B. If entered into any time prior to the expiration of the period of declarant control contemplated by subsection A hereof, no contract or lease entered into with the declarant or any entity controlled by the declarant, management contract, employment contract or lease of recreational or parking areas or facilities, which is directly or indirectly made by or on behalf of the unit owners' association, its executive organ, or the unit owners as a group, shall be entered into for a period in excess of two years. Any such contract or agreement entered into on or after July 1, 1978, may be terminated without penalty by the unit owners' association or its executive organ upon not less than ninety days' written notice to the other party given not later than sixty days after the expiration of the period of declarant control contemplated by subsection A hereof. Any such contract or agreement may be renewed for periods not in excess of two years; however, at the end of any two-year period the unit owners' association or its executive organ may terminate any further renewals or extensions thereof. The provisions of this subsection shall not apply to any lease or leases which are referred to in § 55-79.48 or which are subject to subsection (e) of § 55-79.54.

C. If entered into at any time prior to the expiration of the period of declarant control contemplated by subsection A, any contract, lease or agreement, other than those subject to the provisions of subsection B, may be entered into by or on behalf of the unit owners' association, its executive organ, or the unit owners as a group, if such contract, lease or agreement is bona fide and is commercially reasonable to the unit owners' association at the time entered into under the circumstances.

D. This section does not apply to any contract, incidental to the disposition of a condominium unit, to provide to a unit owner for the duration of such unit owner's life, or for any term in excess of one year, nursing services, medical services, other health-related services, board and lodging and care as necessary, or any combination of such services. The rule of property law known as the rule restricting unreasonable restraints on alienation shall not be applied to defeat any provision of the condominium instruments requiring that the unit owners be parties to such contracts.

E. If the unit owners' association is not in existence or does not have officers at the time of the creation of the condominium, the declarant shall, until there is such an association with such officers, have the power and the responsibility to act in all instances where this chapter requires action by the unit owners' association, its executive organ, or any officer or officers.

F. Thirty days prior to the expiration of the period of declarant control, the declarant shall notify the governing body of the city, county or town in which the condominium is located of the forthcoming termination of declarant control. Prior to the expiration of the thirty-day period, the local governing body or an agency designated by the local governing body shall advise the principal elected officer of the condominium unit owners' association of any outstanding violations of applicable building codes, local ordinances or other deficiencies of record.

G. Within forty-five days from the expiration of the period of declarant control contemplated by subsection A, the declarant shall deliver to the president of the unit owners' association or his designated agent (i) all association books and records held by or controlled by the declarant including, without limitation, the following items: minute books and all rules, regulations and amendments thereto which may have

COX COMMUNICATIONS

www.cox.com

December 30, 2007
Account Number:

Enc #3

Hector Castro
[redacted]
[redacted], VA 23462-4650 00

Previous Balance	Payments Received	Adjustments	Current Charges	Total Due	Due By
$1.80	$-1.80	$0.00	$1.80	$1.80	Jan 21, 2008

Current Charges as of December 30, 2007

Total Telephone Services	1.71
Total Taxes and Surcharges	0.09
Total Current Charges	**$1.80**

Questions?
SALES/BILLING: 757-222-1111
REPAIR SERVICE: 757-222-2222
www.cox.com/hr

About Your Account

Cox PIN:

Thanks for being a Cox customer.

What's New From Cox

Beginning January 1, 2008 your monthly statement will show a line item charge of $0.20 for "PEG Fee." This fee helps to cover the costs associated with Virginia Beach franchise required PEG (Public, Educational, and Governmental) access programming. For the last year, Cox had absorbed this cost but, can no longer do so.

Don't think of Home Technology as being complicated! Now there's an easy way to get the technical support you need...the Service Assurance Plan from Cox! Ask one of our Customer Care representatives for more information or sign up online at www.cox.com/assurance.

Roll out the movies. Bring on the stars. Watch over 350 movies a month on Starz®. Start hits like Wild Hogs and Are We Done

Continued on Reverse

COX

P.O. BOX 62545
VIRGINIA BEACH VA 23466

Account Number:

Total Due: $1.80

Payment Due By:
Jan 21, 2008

Please return this portion with your payment.

Amount Enclosed $_____

Allow 7 days for processing. Please include your account number on your check. Make checks payable to Cox Communications. Payment of this bill confirms your subscription to services and possession of equipment as listed.

[redacted]

COX COMMUNICATIONS
P.O. BOX 9001087
LOUISVILLE KY 40290 1087

Payments

Date	Type	Amount
12/21/07	THANK YOU FOR YOUR PAYMENT	-1.80
Total Payments Received		**$-1.80**

Cox Digital Telephone Service

Telephone Service for [redacted]

Monthly Telephone Service from Jan 3 to Feb 2	Quantity	Amount
COX LONG DISTANCE*	1	0.00
CONTROL PLUS	1	0.00
VOICE MAIL*	1	0.00
COX NATIONWIDE CONNECTION 1	1	0.00
BASIC MONTTLY SERVICE	1	0.00
FCC ACCESS CHARGE		0.00
[redacted]	1	1.71
COX SERVICE ASSURANCE PLAN*		0.00
Total Monthly Telephone Service		*$1.71*
Telephone Usage Charges		
Cox Long Distance*	21	0.00
Total Telephone Usage Charges		*$0.00*

Total Telephone Service for [redacted] **$1.71**

REMINDER

Your current IntraLATA carrier is COX COMMUNICATIONS . Their customer service number is (757) 224-1111.

Your current InterLATA carrier, including international calls is COX COMMUNICATIONS . Their customer service number is (757) 224-1111.

Total Cox Digital Telephone Service **$1.71**

Cox Digital Telephone Service Call Detail

Call Detail for [redacted]

Cox Long Distance

Date	Time	Place	Number	Rate/Time	Min:Sec	Amount
November 28	08:15A	[redacted]	[redacted]	DD/R	5:00	$0.00
November 29	11:01A	[redacted]	[redacted]	DD/D	2:00	$0.00
November 30	03:48P	[redacted]	[redacted]	DD/R	11:00	$0.00
December 3	09:29A	[redacted]	[redacted]	DD/R	9:00	$0.00
[illegible]mber 4	03:32P	[redacted]	[redacted]	DD/D	24:00	$0.00
[illegible]mber 4	06:27P	[redacted]	[redacted]	DD/R	8:00	$0.00
[illegible]cember 6	09:07A	[redacted]	[redacted]	DD/R	1:00	$0.00
December 10	01:04P	[redacted]	[redacted]	DD/D	35:00	$0.00
December 10	05:14P	[redacted]	[redacted]	DD/R	7:00	$0.00

Enc #4

Virginia Local Telephone Companies
Telecommunications "Bill of Rights"*

You have a right to:

- Affordable and quality local telecommunications services
- Seamless levels of service when migrating between local telecommunications service providers
- Select and keep the telecommunications service provider of your choice
- Keep your telephone number when changing local telecommunications service providers while at the same location
- Maintain local telephone service when there is a valid billing dispute under investigation or when payments are current for basic local telecommunications services
- Identity protection to preclude the unauthorized use of records and personal information
- Safety and security of persons and property not to be intentionally jeopardized by telecommunications service providers
- Honest and accurate sales and service information
- Timely, accurate, and understandable billing
- Participate in the formation of Virginia telecommunications policies
- Dispute resolution up to and including a full hearing before the Virginia State Corporation Commission

*This "Bill of Rights" is a summary overview of your rights under various state and federal laws and regulations and does not independently create or vest enforceable substantive rights. Enforcement of your rights will depend upon the application of specific legal authorities to the circumstances of your particular dispute with the telephone company. If you believe that your legal rights have been violated and you cannot adequately resolve your dispute with your phone company, you may contact the SCC at 1-800-552-7945 or, if in the Richmond local calling area, 804-371-9420.

Enc # 5

Tracy Kubitz
Regulatory Affairs
Cox Virginia Telcom, Inc.
1341 Crossways Blvd.
Chesapeake, Virginia 23320

December 11, 2007

Via Electronic Mail

Anna Clarke
Virginia State Corporation Commission
Division of Communications
Tyler Building, Ninth Floor
1300 East Main Street
Richmond, Virginia 23219

RE: **Marlyn Castro**
Customer ID: [redacted]

Dear Ms. Clarke:

On behalf of Cox Virginia Telcom, Inc. ("Cox"), I would like to respond to the inquiry of Marlyn Castro to the Virginia State Corporation Commission ("SCC").

Ms. Castro's complaint indicates that she recently found out that the only company she can have for service is with Cox and the contract is for 25 years. She claims that she was not advised of this when she purchased the property and even if she went with another provider, she would still have to pay Cox.

Ms. Castro resides in a condominium complex developed by L. M. Sandler & Sons, Inc. ("Sandler"). Sandler has a contract with Cox to provide condominium owners with digital cable, high speed internet and telephone services. This contract between Cox and Sandler does not preclude access to the condominium complex by other telecommunications service providers.

Cox has been advised by Carol Hahn, Esq. from Sandler that before a potential new home owner signs a contract to purchase a condominium, they receive a Disclosure Package that contains a Communications Services Agreement. The Communications Services Agreement explains the communications services that are provided to the owner as a part of the homeowner association fees. The potential new owner signs a receipt indicating that that they have received this Disclosure Package. They are also given a right to rescind their contract within a certain period if they decide they do not agree with any items in the Disclosure Package. When the home owner purchases the condominium, they sign a Homeowner's Agreement that again explains the communication services included.

On November 27, 2007, Cox contacted Ms. Castro regarding her complaint and advised Ms. Castro to address her concerns with Debbie Dietz from Sandler. Cox further advised Ms. Castro that she can chose another service provider if she wishes, but would need to address the matter with Sandler not Cox.

Cox feels that this complaint is unjustified.

If you have any questions, please contact me for further assistance.

Sincerely,

Tracy Kubicz

c: Marlyn Castro
[redacted]

Exc. #6

castroma

From: "Kim"<kim@EquityT.com>
To: "castroma" [redacted]
Sent: Friday, January 04, 2008 10:09 AM
Subject: RE: Homeowners Agreement Document

I am sorry...I had spoken to Ms. Williams and I don't have any idea where you would get that form from it is not something we have here in our office. I checked with the Jill the loan officer at Tidewater and the builder and they do not have it either...all I can think of is that you may have received it from the site when you signed the contract. I am sorry I can not be more help.

-----Original Message-----
From: castroma [redacted]
Sent: Friday, January 04, 2008 9:03 AM
To: Kim
Subject: Re: Homeowners Agreement Document

Kim,

Who I need to contact to get a signed copy of the Homeowners agreement.

Please let me know as soon as possible,
Marilyn Castro

----- Original Message -----
From: "castroma" <[redacted]>
To: <[redacted]>
Sent: Thursday, December 20, 2007 9:38 AM
Subject: Re: Homeowners Agreement Document

> Kim,
> Can send me a signed copy of this document.
>
> Happy Holidays
> Marilyn Castro
>
> ----- Original Message -----
> From: "[redacted]
> To: <kim@equityt.com>
> Cc: [redacted]
> Sent: Sunday, December 02, 2007 3:01 PM
> Subject: Homeowners Agreement Document
>
>
>> Dear Ms. Ebmeier,
>> My name is [redacted], formerly [redacted] purchased my
>> home and completed closing on November 1, 2006. I purchased a condo at
>> Bluegrass, Lexington lot [redacted]

>>
>> I am requesting a copy of a document that was not provided to me at the
>> time of closing. Please send me a SIGNED copy of the "Homeowners
>> Agreement- clean"- document # (12-21-05).
>>
>> Also copied on this email is Marilyn Castro, lot [redacted] is requesting the
>> same document.
>>
>> Please send us our separate copies to the following addresses:
>>
>> Marilyn Castro
>> [redacted]
>>
>> [redacted] Williams
>> [redacted]
>>
>> Thank you,
>> Mrs. Williams
>>
>

Exc #7

December 6, 2007

To: Distribution

RE: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments MB Docket No. 07-51.

Dear Sir or Madam,

On October 31,2006, I purchased a condominium unit in [redacted] at Lexington, located in Virginia Beach, VA, built by subsidiaries of L.M. Sandler & Sons. Bluegrass Park was advertised as a "Wired Community" in which it had a direct business relationship with the local cable company Cox Communications. We as the homebuyer were told of the communication bundling package that was represented as a requirement for purchase by the builder's selling agents. And it was disclosed that in order to purchase a unit within the community we were in effect forced to sign a **Non Binding Reservation Agreement To Become a Binding Purchase Agreement**. Clause (m) of The Non Binding/Binding Agreement detailed that I would agree to have Cox's Bundle package, and would pay $145/month for these services. This amount is required to be paid by all owners whether any of the services are used or not. However, clause (m) had reference to a contract that did not provide any information on the period, exclusive nature of the contract, and other important information.

Ten days after signing the Non Binding/Binding Agreement, I received a disclosure package with some information about different contracts. The initial agreement is for 25 years based on the letter provided by UPA. As a homeowner and paying customer, I do not know any details about the contract that regulates my cable service. We are deeply concerned that our community is not be able to take advantage of advances in technology as well as competitive pricing offered from providers in the market, unless we are willing to pay for those services with another company, in addition to the monthly $145 charge.

Each homeowner is not receiving an itemized invoice from Cox Communications. Therefore we do not really know where all of our money is going and for exactly what level of service. The normal process for acquiring cable services is to call the service provider, select the service, and get them delivered without signing a single document. To date, I have at least 4 contracts detailing and restricting all aspects of my cable, internet, and telephone. And all the while, the developer maintains each member of our community is receiving a "deal".

October 31, 2007 the FCC adopted rules to increase competition among video providers for consumers residing in Multiple Dwelling Units (MD Docket No. 07-51). The primary function of the ruling is to eliminate exclusivity clauses limiting fair competition within the market. The definition of an "MDU" according to this *Report and Order* clearly denotes that this ruling covers condominium buildings. It states it covers any dwelling space that is distinctly separate but shares some common space requiring central management. The central management in our case is United Property Associates(UPA), and they are in charge of collecting the monthly Homeowner and Condo fees. These fees

cover ground maintenance, waste removal, and they also go toward the $145 for Cox Cable.

We have contacted UPA to request information on how the recent FCC ruling would impact the bundling contracts between Sandler and Cox Communications, and if the agreements we have signed would be null and void. The Homeowners Associations, UPA, responded by saying their legal team has been made aware of the FCC ruling, and they have determined it does not apply to our community. In a letter dated November 26, 2007, UPA stated that we are "Townhomes", and the ruling is only made to impact apartments and condos. This is extremely alarming because all contracts, documentation, and even the builder website refers to our community as condominiums, i.e. having Condo fees to take care of ground maintenance, waste removal, etc. In addition, even the deed to our homes states that we have purchased a condominium. Further, they stated that our arrangement was bulk service and was at the benefit of a special bulk price discount negotiated between the builder Sandler and Cox Communications, and this is not covered by the ruling. Cox Communications has also been contacted regarding the issue and they refuse to give any information about the contract for our community.

The "Nonbinding Reservation Agreement to Become a Binding Purchase Agreement" does not match the communications contracts filed at the Virginia Beach Circuit Court. The contract number (20060126000139260) referenced in our Nonbinding agreement - Clause M - presented to us by Sandler, was supposed to be the contract that binds us to the 25+ year communication agreement. When retrieved from the Circuit Courts, it has nothing to do with the communications agreement. Contract 20060126000139260 actually is the "Declaration of Protective Covenants and Restrictions". Furthermore, the aforementioned contract deals with utilities and grounds maintenance. The incorrect contract number has been provided to all residents of the Lexington community via a signed contract with Sandler.

We have yet to find the actual contract agreement filed with the circuit courts between Sandler and Cox Communications. We feel that their failure to disclose has led to a myriad of issues surrounding all binding contracts between Lexington homeowners and Sandler Inc. I..M. Sandler and Sons L.L.C has lied to all of the homeowners telling us we are now Townhomes.

I request, The Federal Communications Commission ban bulk billing agreements. I believe bulk billing agreements are attempts to bypass current telecommunications and antitrust laws. These corporations provide telecommunication services to a large number of customers using monopolies with prevailing service providers, under unregulated conditions, and with disregard to consumers' rights. Bulk billing agreements are worse than exclusivity contracts because bulk billing typically includes cable, internet and telephone at a premium price under the false pretense of getting a special price. The developer profits from the discount and the homeowners end up paying retail or worse. Bulk Billing arrangements are contrary to Congressional efforts to advance broadband technology in the United States. These agreements eliminate competition and telecommunication advances for the communities affected. Any company, regardless of

industry sector, that provides telecommunications or cable services, should be regulated. No citizen of the United States of America, the land of the free, should be unconstitutionally bound to regressive contracts that fill the pockets of the rich and powerful. We are in need of action and can only hope we receive a speedy response. We should not have to review hundreds of pages of contracts or hire a lawyer to obtain or change telephone, cable or internet services.

Regards,

Hector Castro

Distribution: Senator Jim Webb
Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert McDowell
Mayor Meyera E. Oberndorf
Steve Sandler

Copy: Debra Dietz
Patrick J. Esser
Paul McRae
10 On Your Side
Bob McDonnell
Anna Clarke
James K. Spore

Enclosures:
- United Property Associates letter dated November 26, 2007
- Clause M from Non Binding Reservation Agreement To Become a Binding Purchase Agreement

This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Virginia. All headings are for convenience of reference only and in no way limit or determine the interpretation of this Agreement.

(j) No addendum or amendment to this Agreement shall be valid unless signed by both Seller and Purchaser.

(k) NOTWITHSTANDING ANY ORAL OR WRITTEN REPRESENTATION TO THE CONTRARY, THE SALE OF THE CONDOMINIUM, AS PROVIDED FOR HEREIN, IS NOT A SALE OF A SECURITY WITHIN THE MEANING OF SECTION 2(1) OF THE SECURITIES ACT OF 1933. PURCHASER ACKNOWLEDGES AND AGREES THAT: (i) THE CONDOMINIUM HAS NOT BEEN REPRESENTED AS AN INVESTMENT TO PURCHASER BY SELLER OR ANY AGENT OF SELLER; and (ii) PURCHASER HAS NOT BEEN INDUCED BY SELLER, OR ANY AGENT OF SELLER, TO ENTER INTO THIS AGREEMENT BECAUSE OF ANY ECONOMIC BENEFIT TO BE DERIVED FROM OWNERSHIP OF THE CONDOMINIUM THROUGH THE EFFORTS OF OTHERS.

(l) Any model Unit is displayed for illustrative purposes only, and such display shall not constitute an agreement or commitment on the part of Seller to deliver the Condominium Unit in exact accordance with any model Unit. None of the items or furnishings shown in any model Unit are included in this Agreement unless Seller specifically agrees in writing to deliver same as part of the Purchase Price.

(m) THE MASTER ASSOCIATION HAS ENTERED INTO AN AGREEMENT TO OBTAIN COMMUNICATIONS SERVICES, DATED DECEMBER 26, 2005, A COPY OF WHICH IS OF RECORD IN THE CLERK'S OFFICE AS INSTRUMENT NO. 20060126000139360. SUCH AGREEMENT, AS THE SAME MAY BE MODIFIED OR AMENDED, IS HEREINAFTER REFERRED TO AS THE "COMMUNICATIONS SERVICES AGREEMENT." FOR SO LONG AS THE COMMUNICATIONS SERVICES AGREEMENT REMAINS IN EFFECT, THE ASSESSMENTS OWED BY EVERY UNIT OWNER TO THE MASTER ASSOCIATION WILL INCLUDE, WITHOUT LIMITATION, PROVISION FOR THE PAYMENT OF THE "BASIC SERVICES" AS DEFINED IN THE COMMUNICATIONS SERVICES AGREEMENT, WHICH PAYMENT WILL BE REQUIRED REGARDLESS OF WHETHER A UNIT OWNER USES SUCH BASIC SERVICES. THE COMMUNICATIONS SERVICES AGREEMENT AND THE MASTER DECLARATION ALSO REQUIRE THAT EVERY UNIT OWNER SIGN AND DELIVER TO THE MASTER ASSOCIATION, THE HOMEOWNER AGREEMENT IN THE FORM ATTACHED TO THE COMMUNICATIONS SERVICES AGREEMENT ON OR BEFORE SETTLEMENT OF SUCH UNIT OWNER'S PURCHASE OF A UNIT OR ACQUISITION OF RECORD TITLE TO A UNIT, WHICHEVER FIRST OCCURS. THE COMMUNICATIONS SERVICES AGREEMENT CONTAINS ADDITIONAL PROVISIONS DESCRIBING THE SERVICES TO BE PROVIDED AND THE RIGHTS, OBLIGATIONS, AND RESTRICTIONS APPLICABLE TO UNIT OWNERS AND THEIR UNITS.

UNITED
PROPERTY
ASSOCIATES

535 SOUTH
INDEPENDENCE BLVD.
SUITE 200
VIRGINIA BEACH
VIRGINIA
23452-1183
(757) 497-5252
FAX
(757) 497-9133
WATS
(800) 578-9722

•

239
THIMBLE SHOALS BLVD.
SUITE 1003
NEWPORT NEWS
VIRGINIA
23606-3562
(757) 873-1185
FAX
(757) 873-8907

•

4550
TOWN POINT RD.
SUITE 113
SUFFOLK
VIRGINIA
23435
(757) 484-8706
FAX
(757) 484-5717

•

183
BULIFANTS BLVD.
SUITE A
WILLIAMSBURG
VIRGINIA
23188
(757) 345-5383
FAX
(757) 345-5385

•

SPECIALISTS IN
THE MANAGEMENT
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HOUSES •
CONDOMINIUM
AND HOMEOWNER
ASSOCIATIONS

•

www.unitedproperties.org

November 26, 2007

Thank you for your interest in our community and your recent questions about telecommunications services available to residents.

Recent news articles have publicized the fact that the Federal Communications Commission (FCC) has issued a ruling that prevents franchise cable providers from entering into exclusive contracts for video services to residents of multiple dwelling units. The intention was to prevent those providers from enforcing contracts that do not benefit consumers.

Some residents in our community have asked about these stories and what effect the ruling may have on them. Our legal advisors tell us that this ruling relates to "building exclusivity clauses" and is directed at cable providers who have entered into exclusive contracts with apartment owners and other multiple dwelling unit buildings. Our community (and other townhome and single family communities), and the kind of contracts we have(which are known as "bulk service" contracts) are not the subject of the FCC ruling.

"Bulk service" contracts are negotiated for the benefit of all consumers in the community. These contracts, which are part of the documents disclosed to all homebuyers, will always provide a discount below what the video service provider charges for identical services to other homes within the area (not including promotional or introductory rates that are temporary). The contracts run for up to 25 years, unless terminated sooner, with the possibility of renegotiation and renewals.

This issue was explained in a recent news article that compares the cost of different services available in Hampton Roads. This article is attached for your information.

Unlike the target of the FCC ruling, apartment owners who deny residents the ability to take advantage of competitive price reductions, the contracts in our community ensure the advantages of competition in the marketplace through ongoing, permanent discounts. Homeowners receive, and will

always receive, a 10% discount below what the service provider charges in the market for identical services on a continuing basis, with adjustments performed annually. The only fee involved is the franchise tax (and any other charge assessed by a government entity), generally about $8 a month, which, by law, goes back to he telecommunications provider for it to pay the charge. Modems are now provided to residents free of charge, along with the in-home wire maintenance.

There are many advantages to living in a planned community such as ours, and we feel our telecommunications package is one of them. I hope this information is helpful to you.

Sincerely,

[redacted]
Association Manager on behalf of your Board of Directors
for the Lexington Homeowners Association

attachments

Enc. #8

---- Original Message ----
From: castroma
To: communications@scc.virginia.gov
Sent: Tuesday, December 11, 2007 9:55 AM
Subject: Complaint Report

Ms. Clarke,
I opened a complaint couple of weeks ago via the SCC. I had a conversation with COX communication why I was unable to select the telephone provider of my choice and why the current invoice I receive every month does not have amounts. This is in direct violation to the Cable law section 14. Also why I'm not protected by the Virginia Telecommunications Bill of Rights. Until this day I have not receive an answer from COX and I would like to know if you had received the final answer from COX.

Respectfully,
Marilyn Castro
[redacted]

castroma

From: "castroma" <[redacted]>
To: "Larry Kubrock" <[redacted]>
Sent: Wednesday, February 27, 2008 11:48 AM
Attach: Private cable operators Complaint.doc; Comments 07-51-2.doc; DEV PCO.doc; Master Communications Easement.pdf
Subject: Re: Memo from the State Corporation Commission's Office of General Counsel

Mr. Kubrok,

I understand the "disclosure" is not within the jurisdiction of the State Commission. I just wanted to clarify I had never signed the contract and clause (m) contain incorrect information. I do agree that it will be a long tunnel!!! I have already submitted my comments to the FCC. I have been in contact with other communities one northern Virginia and three others in Florida. We are making our case to the FCC by making comments and also by replying to comments, as the FCC requested on the Proposed ruling. Enclosed are my comments.

Thanks again for taking the time to investigate the inquiry,
Marilyn Castro

---- Original Message ----
From: Larry Kubrock
To: 'castroma'
Sent: Wednesday, February 27, 2008 10:08 AM
Subject: RE: Memo from the State Corporation Commission's Office of General Counsel

Ms. Castro,
If I understood them correctly, our attorneys stated that there are two issues here. One is a contract issue where the SCC nor the FCC has jurisdiction. That issue would have to be resolved in a court of competent jurisdiction. The second is the exclusivity issue being handled at the FCC. Some of the exclusivity issue was addressed but now the remaining issue is the exclusivity being dressed up as bulk billing. After reading the order adopted by the FCC and its request for additional comments on the bulk billing, I believe they are already aware of the problem and will likely address it in the order. Some of the FCC commissioners stated that they believe the initial FCC ruling will be appealed and will be tested in the courts. This will be an ongoing issue for some time but in the end it will hopefully be resolved in favor of enhancing, not restricting, competition. While I may agree with all the issues you brought to our attention, especially the contract issue, we don't have the authority to address contract law. You obviously have done your homework and you might want to consult an attorney that specializes in contract law to review your case. I think there is light at the end of the tunnel, but it may be a long tunnel.
Larry KuBrock
[redacted]

-----Original Message-----
From: castroma [redacted]
Sent: Wednesday, February 27, 2008 9:45 AM
To: Larry Kubrock
Subject: Re: Memo from the State Corporation Commission's Office of General Counsel

Mr. Kubrock,

Thank you for your assistance. I don't agree with the first paragraph of the report; how I, as homeowner became bind to this

contract "Non Binding Reservation Agreement to become a Binding Purchase Agreement".

Paragraph one of the report states: " All condominium owners in the development sign a Non Binding Reservation Agreement to become a Binding Purchase Agreement which provides that the condominium owner agrees to take Cox Communication's bundle package" There is no mention of COX anywhere on the Non Binding/Binding agreement. There was never a correct disclosure of the Agreement To Obtain Communication Services.

The basic argument here is one of fairness, as a government entity, legally reviewed document this document start by asserting this contract was "knowingly" entered by homeowners. How could you "knowingly" enter a contract whose details were hidden from you.

Also as stated before, clause (m) of the Non Binding/Binding Agreement was improperly referenced on the contract and not properly disclosed. The contract number on clause (m) 20060126000139260 is not from the referenced Agreement To Obtain Communication Services but from the Declaration of Protective Covenants and Restrictions. The Declaration of Protective Covenants and Restrictions does not have any information about Cox or the Bundle/Exclusive 25-75 year contract. The Declaration of Protective Covenants and Restrictions reference a "Communications Service Agreement" but there are no instrument numbers. How could you find a contract whose number is improperly referenced, incorrect or missing? The city clerk does not provide that level of service. If you are doing a search with the wrong contract number you will end up with the wrong document and with no information about the contract they are referencing. Since the contract was not properly reference, it was not disclosed.

Additionally, in the COX letter the developer lawyer asserted all homeowners signed the Homeowners Agreement. This is to imply homeowners were given the Homeowners Agreement which is part of the Agreement to Obtain Communications Services. I was never given the Agreement to Obtain Communication Services therefore I never sign the Homeowner Agreement. Further, even the developer lawyer on Cox Letterhead asserts that the Homeowners Agreement and implicitly the Agreement to Obtain Communication Services constitute the legal base for the Communication Contract between the homeowners and the developer. Yet these document, were not given to homeowners and as a consequence were not signed as implied by the developer lawyer.

Regardless of the limited **recourse** under Virginia Real State Code for improper disclosure during a real state transaction past the 10 days period, It my opinion that no document would be correct asserting that you are bound by a contract that could be intentionally or unintentionally

misrepresented and that a the very least any reference to such contract would shift the burden of proof on intention to the party with the "upper hand" on the deal, which is the developer, drafter of the contract. Plainly the developer did not follow the legal procedure stated by his own lawyer on the Cox Letter to effect this contract. The question is; how could you be legally tied to a contract you never signed or seen and whose procedures were not followed? Could you said beyond doubt that said contract is legally binding? Could you say based on this evidence that "the condominium owner agrees to take Cox Communication's bundle package" when given the evidence we have zero information other than what is plainly stated in clause (m)?

If the commission needs additional copies/instruments please let me know, I will be more than happy to send you copies.

Respectfully,
Marilyn Castro
[redacted]

----- Original Message -----
From: Larry Kubrock
To: castroma
Cc: Anna Clarke
Sent: Tuesday, February 26, 2008 4:18 PM
Subject: FW:

February 26, 2008
Ms. Castro,
Attached is a memo from the State Corporation Commission's Office of General Counsel concerning the marketing agreement between your condo association and Cox Communications. Mr. Mueller and Ms. Williamson did extensive research into this complaint and did not find an immediate remedy for your situation. These agreements are currently under review at the Federal Communications Commission in case 07-189. Paragraph 65 in the FCC's Report and Order and Further Notice of Proposed Rulemaking states: "We also seek comment on these same questions with respect to "bulk billing" arrangements. Some have argued that bulk contracts are anti-competitive. As we understand them, bulk billing arrangements may be exclusive contracts because MDU owners agree to these arrangements with only one multichannel video programming distributor, barring others from a similar arrangement... However, because of the "bulk billing" nature of the contract, residents would have to continue paying a fee to the provider with the bulk billing contract as well as pay a subscription fee to the new service provider....Do these arrangements have the same practical effect as exclusive access arrangements in that most customers would be dissuaded from switching video poviders?"

In a nutshell I suggest that you file comments in the open case at the FCC and let them know of the problem the "bulk billing" arrangement has on your decision to change providers or on folks similarly situated. Our attorney expects the FCC will rule on this particular issue and that the ruling will likely have to be decided in court. The resolution may be in sight but not likely to be totally resolved in the near term. I wish we could resolve the complaint for you but have

no jurisdiction in this matter. I do hope that this is helpful and if you have questions, that you will call or write.

Larry Kubrock
Senior Telecommunications Specialist
Division of Communications
State Corporation Commission
[redacted]

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

February 22, 2008

MEMORANDUM

TO: Larry Kubrock, Division of Communications

FROM: Don R. Mueller, Associate General Counsel DRM
Alexandra Williamson, Intern

RE: Rights of condominium owner to select a telecommunications provider apart from the provider contracted by the condominium association

Cox Communications provides bundled telecommunications and cable services under a long term contract with the Bluegrass Park Condominium Association ("Association") to the condominium owners in the Bluegrass Park condominium development in Virginia Beach. All condominium owners in the development sign a "Non Binding Reservation Agreement to Become a Binding Purchase Agreement" which provides that the condominium owner agrees to take Cox Communication's bundle package. This agreement must be signed in order to purchase a condominium in the Bluegrass Park development. One Bluegrass Park condominium owner, Ms. Castro, seeks release from any obligation to purchase under the long term contract with her Association.

The State Corporation Commission has not asserted jurisdiction in these types of contractual disputes and any available remedy must be sought in the appropriate court[1]. The following is limited to discussion of the legal issues presented.

The question posed by the Division of Communications is whether this exclusive contract for Cox Communication's services is an unfair method of competition and therefore proscribed by Section 628[2] of the Communications Act of 1934, as amended[3] ("Act") and whether the condominium owners are bound by this contract and must pay the fee to Cox Communication regardless of whether they secure other telecommunication services from another provider.

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[1] An earlier contract case in which the Commission refrained from acting involved KMC Telecom of Virginia, Inc. ("KMC"), sought to require Bell Atlantic-Virginia, Inc. ("Verizon") to provide its Long-term Contract customers with a "Fresh Look" opportunity. KMC later withdrew its request. (See Final Order attached, issued May 10, 2001, Case Nos. PUC-1998-00175 and PUC-1999-00081). The Commission's Rules Governing the Sharing or Resale of Local Exchange Service (Shared Tenant Service, Chapter 409) do not address bundled services, although Rule 608 provides that any end user within a shared tenant service building or facility has the right to subscribe to service directly from the certified local exchange carrier.

[2] 47 U.S.C. § 548.

[3] 47 U.S.C. § § 151 *et seq.*

The FCC issued a Report and Order in October of 2007, FCC 07-189 ("Report and Order"), which addresses the use of exclusive agreements between multi-channel video programming distributors ("MVPDs") and private real estate developers and owners of multi-dwelling unit properties ("MDUs") for video service.[4] In its previous decisions, the FCC defined MDUs to include apartment, cooperative, and condominium buildings but now expands the definition of MDUs in this Report and Order[5] to also include gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. The Report and Order declares null and void any "building exclusivity" clauses between cable operators and owners of MDUs.

In its Report and Order, the FCC determines that exclusivity clauses cause significant harm to competition and consumers. Exclusivity clauses, especially when used in current market conditions by incumbent cable operators, are a barrier to new entry into the multi-channel video marketplace and the provision of triple play offerings.[6] Such exclusivity clauses inhibit competition and in doing so, deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content, as well as access to alternative providers of broadband facilities and the triple play of communications services their facilities support.[7] The FCC ultimately concludes that the use by cable operators, including telecommunications carriers that provide MVPD service, of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice in violation of Section 628(b) of the Act.[8] Therefore the FCC prohibits cable operators and other entities that are subject to Section 628 from enforcing existing exclusivity clauses and executing contracts containing new ones.

Cox Communications is considered by Staff to be a MVPD that also provides telecommunications services. The Bluegrass Park condominium development clearly fits within the definition of a MDU as laid out by the FCC. Therefore, OGC is of the opinion that exclusivity clauses between Cox Communications and the condominium development are proscribed by the Report and Order in FCC 07-189. The Report and Order does not address the related issue of exclusive contracts for providing only telecommunication services in MDUs, but because Cox Communications is both a MVPD and a telecommunications provider and because Cox Communications is providing both of these as bundled services and without an option of separating them, the rules promulgated in this Report and Order apply to the entire contract, which would render the exclusivity clause null and void. Additionally, the FCC has begun an inquiry into the use of exclusive contracts for telecommunication services in MDUs.[9]

---

[4] 73 FR 1195 (see also FCC 07-189). The Report and Order may be appealed.

[5] Id.

[6] Triple play bundles video, phone, and broadband internet access services.

[7] Id. 26.

[8] Id. 27.

[9] See Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd. 22983 (2000).

Subsequent to the issuance of the Report and Order, counsel for the Association termed the agreement with Cox Communications a bulk billing arrangement and therefore not covered by the Report and Order. Under these bulk billing arrangements, residents may receive a discounted bulk billing rate but may be required to continue to pay that bulk billing rate even if the resident chooses to take service from, and pay the subscription fee of, a different MVPD. The Report and Order does not specifically address bulk billing arrangements other than to state that the FCC will immediately address this issue. Commissioner Adelstein commented in a separate statement:

> Bulk billing arrangements are a more sophisticated and, perhaps, insidious form of exclusive agreements. While MDU owners generally enter into a bulk billing arrangement with only one MVPD, if a resident is fortunate to receive video service from a competitive video provider, the resident is sometimes forced to pay two separate subscription fees for video service.[19]

It is the belief of OGC that even if the contract at issue here is a considered a bulk billing agreement which is not covered by the Report and Order, the FCC has indicated its intention to remove unfair competition and intends to resolve this issue within six months of the publication of the Report and Order, and will likely determine that bulk billing arrangements are also invalid.

Attachments:

-73 FR 1195 (see also FCC 07-189)
-Latham & Watkins LLP- Client Alert Detail
-Tampa Bay Online Article- Residents Take Case to FCC

[19] FCC 07-189, Statement of FCC Commissioner Jonathan S. Adelstein.

Enclosure (3)

castroms

From: "Williams, Nichole" <[redacted]>
To: [redacted]
Sent: Monday, June 16, 2008 10:59 AM
Subject: Bluegrass- Overdue Request

Ms. Dietz,
It has been more than 1 week since I have requested to obtain a copy of the "Homeowners Agreement", and as stated below in section 2.2.1, I should have receive this document at closing. It has been more than 1 week since I have requested to obtain this copy and still have not heard from you. Based on the procedure stated in the contract that the developer created, is not is not being upheld!

At this point, I am alarmed that all the requests to the developer continue to go unanswered.

In November of 2007, I sent a letter directly to Mr. Sandler requesting a copy of this homeowners agreement, and have yet to receive a response from Mr. Sandler or anyone of his representatives. UPA also will not respond to my request and Equity title does not have a copy.

-Nichole Williams

-----Original Message-----
From: Williams, Nichole
Sent: Tuesday, June 10, 2008 2:15 PM
To: [redacted]
Subject: Bluegrass- Follow Up Items, requested info
Importance: High

Debbie,

Here is the paragraph I mentioned to you a short while ago via phone. Pay special notice to the 3rd sentence from the bottom of the paragraph. Let me know if you have any questions.

Agreement to Obtain Communication Services
Instrument Number# 200601260000139270
Page 4 Section 2.2.1 Homeowner Arrangements for Basic Services.
The Association, on behalf of each Homeowner, agrees to require that each Homeowner, concurrently with the closing of the purchase by such Homeowner of a house within the Development, enter into the Homeowner Agreement substantially in the form attached hereto as Exhibit B, regardless of whether such Homeowners intend to use the Basic Services. The Association will use reasonable efforts to cause Homeowners to enter into such Homeowner Agreement. The Association agrees to deliver a copy of the Homeowner Agreement to each homeowner contemporaneously with any such closing. The Association shall establish a procedure for notifying LBM or its designee of resale closings so that LBM or the Service Provider(s) may coordinate activation. Once the Homeowner Agreement is signed by a new Homeowner at closing, the Association will forward a copy of such signed Homeowner Agreement to LBM or its designee.

[redacted]

HOMEOWNER AGREEMENT

THIS HOMEOWNER AGREEMENT ("**Agreement**") describes certain billing and other arrangements relating to the Internet access, telephone, video, data and information services that are or will be provided to homeowners at Lexington ("**you**") in accordance with the Declaration of Covenants, Conditions and Restrictions (Lexington Owner's Association), as amended from time to time (the "**Declaration**").

1. **Basic Services Generally.** As a homeowner in (the "**Development**"), you will receive a number of services from Lexington Owners Association, Inc. (the "**Association**"). These services will be provided to you in accordance with the terms of the Declaration and they may include basic Internet, telephone and video services (the "**Basic Services**"). **The Basic Services are more fully described in the initial disclosure package that you received from the Association prior to signing your home purchase contract.** The Basic Services will be provided to you through a contract between the Association and Lexington Infrastructure Management, L.L.C. ("**LIM**"), entitled "Agreement to Obtain Communication Services", as such agreement may be amended and/or restated from time to time (the "**Association Contract**"). LIM, as agent for the Association, has arranged for the provision of the Basic Services to the Association and/or homeowners through arrangements with third party service provider(s) (each a "**Service Provider**").

2. **Premium Services.** You may receive information from Service Provider concerning premium video, telephone and Internet services (the "**Premium Services**") that are available from Service Provider. You are free to purchase or reject the Premium Services as you wish. Any Premium Services that you select will be purchased directly from Service Provider and the terms and conditions for these services will be set forth in a separate agreement between you and Service Provider.

3. **Billing.** To the extent provided through the Association, you will be billed for the Basic Services as part of the monthly fee that you are required to pay as a homeowner in the Development (the "**Association Assessments**"). The Association Assessments are more specifically described in the Declaration and are subject to change as provided in the Declaration. **PLEASE REMEMBER THAT YOU WILL BE REQUIRED TO PAY FOR THE BASIC SERVICES EVEN IF YOU DO NOT USE THEM.** Service Provider will bill you separately for the following, which are not covered by the Association Assessments: (1) installation and activation charges relating to the Basic Services, (2) equipment rentals and (3) all charges due in connection with any non-Basic Services, including Premium Services, that you elect to purchase from Service Provider (*see* Section 2). If the Association Contract is terminated for any reason, the Basic Services may continue to be provided to you and, as long as you do not elect to terminate those services, you will be responsible to pay for them directly.

4. **Acknowledgement.** By signing this Agreement, you acknowledge that:

(A) you have received prior notice of your obligation to pay for the Basic Services as that obligation is described in Section 3;

(B) you understand that LIM and Service Provider will incur significant costs to arrange for and coordinate the construction of a sophisticated network to provide Basic Services to the Development;

(C) you understand that LIM and Service Provider will incur additional costs to arrange for and coordinate the construction, operation and maintenance of this network;

(D) you understand that the real estate developer who is developing the Development holds an ownership interest in LIM;

(E) you agree that making the payments described in this Agreement and the Declaration will benefit you by making the network and the Basic Services available to you;

(F) you understand that the Basic Services may be purchased for you by the Association in the manner described in the Declaration and the Association Contract;

(G) in the event that you have problems with the Basic Services or the Premium Services, you should contact Service Provider or its designee directly to resolve those problems;

(H) any equipment provided by Service Provider or its designee such as software and external wiring and related electronic and optical equipment installed by Service Provider up to the point where the wiring enters your residence ("Service Provider Equipment") will at all times remain the property of Service Provider or its designee. You agree not to use the Service Provider Equipment for any purpose other than to use the Basic Services pursuant to this Agreement. You agree that the Service Provider Equipment will not be serviced by anyone other than Service Provider employees or agents. You will not sell, transfer, lease, encumber or assign all or part of the Service Provider Equipment to any third party. You will not relocate the Service Provider Equipment.

(I) Service Provider and its employees, agents, contractors and representatives are authorized to enter your residence in order to install, maintain, inspect, repair and remove the Service Provider Equipment and any

equipment used in connection with the services provided by you. All such access will occur at a time agreed to with you;

(J) you understand that Service Provider will have no direct legal obligations to you with respect to the Basic Services;

(K) you agree to notify any future purchaser of your home or lot in the Development of the fact that Basic Services may be provided by the Association pursuant to the Declaration, fees for these services are included as part of the Association Assessments and that these payments must be made even if the purchaser does not use the Basic Services;

(L) you have the option to obtain any services (including Basic Services) from any other provider serving the Development, but selecting another provider and discontinuing use of all or any portion of the Basic Services will not relieve you from your obligation to pay for the Basic Services as part of your Association Assessments in accordance with Section 3; and

(M) LIM is not a provider of regulated telecommunications or cable television services, and is not a regulated public utility in the Commonwealth of Virginia.

5. **Special Provision Relating to Video Services.** The Basic Services may not include digital video services or any digital converters. If you want to receive digital video services on one or more television(s) and if such television(s) are not "digital cable ready," you may need to rent digital converters from Service Provider or its designee to receive digital video services. This rental will be provided at Service Provider's or its designee's then-current rates and on Service Provider's or its designee's then-current terms and conditions (*see* Section 3). If you sell your home, you must return all digital converters (including any rented converters) and other equipment prior to the sale.

6. **Special Provisions Relating to Internet Services.**

6.1. The Basic Services include Internet access services ("**Internet Services**"). To use the Internet Services, your computer must possess certain minimum technical specifications. Service Provider may change these specifications from time to time by providing you with advance written notice.

6.2. Your use of Internet Services will be subject to Service Provider's acceptable use policy. Service Provider may change this policy from time to time by providing you with advance written notice.

7. **Privacy.** Applicable federal regulations restrict the ability of cable television companies to use, disclose or give other parties access to customer proprietary network information ("CPNI"). CPNI is the information a cable television company may obtain from your use of telecommunications services including items such as the technical configuration of your services, the type of services that you use, the amount of services that you use and the destination of your calls. By signing this Agreement, you agree to waive applicable CPNI or other privacy restrictions and you authorize Service Provider or its designee to use your CPNI to market additional services to you. You can revoke this waiver at any time by providing written notice to Service Provider and/or its designee, as appropriate.

8. **Indemnity.** You will indemnify and hold harmless Service Provider, its designees, LIM, the Association, each owners association or condominium association subject to the Declaration, the real estate developer who is developing the Development and their respective affiliates, agents, employees, officers or directors (collectively, the "**Indemnified Parties**") against claims (including, but not limited to, claims for damage to any business or property, or injury to, or death of, any person), actions, damages, liabilities, costs, and expenses (including, but not limited to, reasonable attorney's fees) caused by or resulting from any act or omission by you or your contractors, agents, employees or invitees in connection with the Basic Services and Premium Services and/or the facilities and equipment used in connection therewith (collectively, the "Services").

9. **Limitation of Liability.** The liability of the Indemnified Parties for damages of any nature arising from errors, mistakes, omissions, interruptions, or delays of any Indemnified Party, or their respective contractors, agents, or employees (collectively, "**Agents**") in the course of establishing, furnishing, rearranging, moving, terminating or changing the Services will not exceed an amount equal to the amounts paid by you for the applicable Service (calculated on a proportional basis where appropriate) during the period during which such error, mistake, omission, interruption or delay occurs. The Indemnified Parties will not be liable for any failure of performance if such failure is due to any cause or causes beyond the reasonable control of the Indemnified Parties and these causes will include, but are not limited to, acts of God, fire, explosion, vandalism, cable cut, any act of a civil or military authority, terrorism, labor difficulties, supplier failures, and national emergencies. The Indemnified Parties will also not be liable for any failure of performance if you fail to notify them of such failure of performance within thirty (30) days after you become aware of such failure of performance. The Indemnified Parties will not be liable for interruptions, delays, errors, or defects in transmissions or for any injury whatsoever, caused by you, or your Agents or invitees or by facilities or equipment provided by you or on your behalf. In no event will the Indemnified Parties be liable for any incidental, indirect, special, or consequential damages (including lost revenue or profits) of any kind whatsoever regardless of the cause or foreseeability of those damages. When the services or facilities of other communication carriers are used separately or in conjunction with the facilities used to provide the Basic Services, the

Indemnified Parties will not be liable for any act or omission of such other common carriers or their Agents.

10. **Miscellaneous.** This Agreement may be amended only by a written amendment executed by all of the parties to this Agreement (each, a "Party" and collectively, the "Parties"). No failure or delay by any Party in exercising any right or remedy under this Agreement and no course of dealing between the Parties shall operate as a waiver of any right, except as otherwise provided herein. No single or partial exercise of any right or remedy by any Party shall preclude any other or further exercise of such right or remedy, except as otherwise provided herein. If any portion of this Agreement is declared invalid or unenforceable by a court or governmental authority of competent jurisdiction, this shall not affect the validity or enforceability of any remaining portion, which such remaining portion(s) shall remain in full force and effect as if this Agreement had been executed with the invalid or unenforceable portions(s) eliminated. This Agreement will be binding upon the Parties and their respective successors in interest and permitted assigns. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the Commonwealth of Virginia without regard to the conflict of law provisions thereof. This Agreement may be executed in any number of counterparts and each shall be considered an original and together they shall constitute one agreement.

In consideration of the promises and the mutual covenants and agreements contained in this Agreement and the Declaration, and intending to be legally bound hereby, the parties listed below execute this Agreement as of the day written below, with the intent and expectation of being legally bound hereby.

LEXINGTON OWNERS ASSOCIATION, INC.,
a Virginia corporation

By: _____
Name:
Title:

HOMEOWNER(S)

By: _____
Name:
Date:

By: _____
Name:
Date:

5297803\Homeowner Agreement-clean (12-21-05).DOC

castroma

From: "Kim" <[redacted]>
To: "castroma" [redacted]
Sent: Friday, January 04, 2008 10:09 AM
Subject: RE: Homeowners Agreement Document

I am sorry...I had spoken to Ms. Williams and I don't have any idea where you would get that form from it is not something we have here in our office. I checked with the Jill the loan officer at Tidewater and the builder and they do not have it either...all I can think of is that you may have received it from the site when you signed the contract. I am sorry I can not be more help.

-----Original Message-----
From: castroma [mailto:[redacted]
Sent: Friday, January 04, 2008 9:03 AM
To: Kim
Subject: Re: Homeowners Agreement Document

Kim,

Who I need to contact to get a signed copy of the Homeowners agreement.

Please let me know as soon as possible,
Marilyn Castro

----- Original Message -----
From: "castroma" <[redacted]>
To: <[redacted]>
Sent: Thursday, December 20, 2007 9:38 AM
Subject: Re: Homeowners Agreement Document

> Kim,
> Can send me a signed copy of this document.
>
> Happy Holidays
> Marilyn Castro
>
> ----- Original Message -----
> From: "[redacted] Williams" <[redacted]>
> To: <[redacted]>
> Cc: <[redacted]>
> Sent: Sunday, December 02, 2007 3:01 PM
> Subject: Homeowners Agreement Document
>
>
>> Dear Ms. Ebmeier,
>> My name is [redacted] Williams, formerly [redacted], purchased my
>> home and completed closing on November 1, 2006. I purchased a condo at
>> Bluegrass, Lexington lot #[redacted]

>>
>> I am requesting a copy of a document that was not provided to me at the
>> time of closing. Please send me a SIGNED copy of the "Homeowners
>> Agreement- clean"- document # (12-21-05).
>>
>> Also copied on this email is Marilyn Castro, lot #[redacted] is requesting the
>> same document.
>>
>> Please send us our separate copies to the following addresses:
>>
>> Marilyn Castro
>> [redacted]
>> [redacted], VA 23462
>>
>> [redacted] Williams
>> [redacted]
>> Virginia Beach, VA 23462
>>
>> Thank you,
>> Mrs. Williams
>>
>

Enclosure (4)

castroma

From: "castroma" [redacted]
To: <DelBTata@house.state.va.us>
Sent: Saturday, January 19, 2008 8:53 PM
Attach: RE_ Homeowners Agreement Document Enclosure (8).eml; UPA letter Enclosure 5).pdf; Virginia Telecommunication Bill of Rights Enclosure (4).pdf; Clause(m) Enclosure (7).pdf; Code of Virginia 55-79.74 Enclosure (2).pdf; cox response Enclosure (6).pdf; Cox Statement Enclosure (3).pdf; FCC Ruling letter Enclosure (9).doc; Master Communications Easement Enclosure (1).pdf; Honorable Delegate Tata Letter.doc
Subject: Request Assistance In Obtaining a Legal Opinion From The State Attorney General

Honorable Delegate Tata,

I request your assistance with the enclosed letter title "Honorable Delegate Tata Letter"

Respectfully,
Hector Castro

[redacted]Marilyn Castro
[redacted]

January 19, 2008

To: Honorable Delegate Robert Tata
4536 Gleneagle Drive
Virginia Beach, VA 23462

I request your assistance in obtaining a legal opinion from the State Attorney General on the practices of exclusive and bulk billing communication contracts between developers, telecommunication providers and homeowners associations in the State Of Virginia. Federal Communications Commission (FCC) docket number 07-51 "Video Services in Multiple Dwelling Units and Other Real Estate Developments" requested comments about these practices. It was shocking to see the large number of constituents in the State of Virginia that are affected by these types of contracts.

I have enclosed a document from Broadband Properties Title "Master Communications Easement in the Fiber Age" as Enclosure (1). This document discloses the complexity of the legal arrangements to create "wire communities" and is similar to what the developer L.M. Sandler and Sons placed in my community. It explains how the developer maintains control, increases profit and avoids as many laws and regulation as possible. It also states how to lock-out or disincentive other service providers. This document shows clear intend to limit competition. Couple with faulty disclosure and contract procedures, the consumer stands no chance against these practices.

In my particular case, I am bound by a Communications Agreement for cable, telephone and internet services between Lexington Homeowners Association and the Lexington Infrastructure Management. This contract is for a term of 25 up to 75 years. Lexington Infrastructure Management is a company owned by the developer L.M. Sandler and Sons LCC. The Lexington Homeowners Association is also controlled by L.M. Sandler until the end of declarant control period. This contract was placed into effect before most homeowners moved in and during the period of declarant control. This contract binds all homeowners to pay $145.00 per month for Communications Services as part of you homeowners assessments. *Other communication providers can be contracted by the homeowner, provided the homeowners still pay the $145.00 monthly fee to the association.* A significant finding is that Virginia Condominium Code 55-79.74 controls the length of contracts entered during the period of declarant control, which in no case should exceed 2 years. The Virginia Condominium Code 55-79.74 is attached as enclosure (2). Homeowners would have to take the developer to court in order to

invalidate this contract. It is my opinion that for middle income families the option of lengthy and costly court litigation with the developer is not attainable.

On my subdivision there is no other communications infrastructure in place. Even if I wanted another service provider, and could afford to pay twice for communications services, there are no incentives for other providers to invest in this additional infrastructure. All prospective customers are bound to Cox Communications and most families can not afford or simply would not pay twice for similar services. This raises the question whether the developer acting as private cable operator engaged in exclusive or bulk billing contract with the only established cable operator violates antitrust laws.

Under these exclusive contracts the goals of the Virginia Telecommunication Bill of Rights could never be attained. Customer will never be able to chose among providers or have a clear and understandable phone bill. The Cable Television Consumer Protection and Competition Act of 1992 Sec 14, details that cable billing should be itemized.

I have never received an itemized cable or phone bill from my association and even when Cox sends me a bill every month all items are set to $0.00, except for $1.86 that I pay Cox to keep my phone number private. This is in direct contradiction to the Cable Act of 1992 and the Virginia Telecommunications Bill of Rights. I attached a Cox Account Statement as enclosure (3) and the Virginia Telecommunications Bill of Rights as enclosure (4).

As a paying customer, I don't know the itemized value of telephone, internet or cable. I also don't know who profits from this contract or how much they are paid. I requested a copy of the contract between the Lexington Infrastructure Management and Cox Communication. This contract information was denied. I have no information on the level of service and contract clauses that control the services that I pay for every month.

The way these contracts are placed in effect amounts to conspiracy to defraud consumers. In my particular case critical documents on the disclosure were improperly referenced and contract procedures were not followed. Further, concerns address to the developer, Homeowners Association and Cox remain mostly unanswered. In the case of the enclosed United Property Associates (UPA) letter, on the issue of our type of property, which my deed details as condominium, UPA on behalf of the Homeowners Association, claimed my property was not a condominium. In the case of the Cox letter , when faced with billing questions based on the Cable Act and Virginia Bill of Rights, Cox Communications and L. M. Sandlers Lawyers drafted a totally unrelated response avoiding the issue, and claiming that the developer properly effected and disclosed the contract. I have attached UPA letter as enclosure (5) and Cox letter as enclosure (6).

On the issue of disclosure, clause (m) of the Non Binding Reservation Agreement To Become a Binding Purchase Agreement referenced a contract Titled "Agreement To Obtain Communication Services" with Instrument Number 20060126000139260. Instrument Number 20060126000139260 is not the "Agreement To Obtain Communication Services" but rather the "Declaration of Protective Covenants and Restrictions". Instrument Number 20060126000139260 reference a "Communications Service Agreement" but there are no instrument numbers attached to this reference. Since the contract was not properly referenced, it was not disclosed. Enclosure (7) is clause (m) of the Non Binding Reservation Agreement To Become a Binding Purchase Agreement.

The procedure to effect the "Agreement To Obtain Communication Services" as explained by Carol Hahn Esq. in the Cox Communications Letter mention that the "Communications Service Agreement" was received as part of the disclosure package. The "Communication Agreement" was not enclosed in the disclosure package. Further, she mentions that each homeowner signed a "Homeowners Agreement". I have asked the closing agent for a signed copy of the Homeowners Agreement but they can't find it. Enclosure (8) is the Equity Title e-mail that mentions the developer doesn't have the signed Homeowners Agreement.

The State of Virginia should protect their constituents from these practices. The FCC banned exclusive contract and is looking into bulk billing practices. The FCC ruling when finalized will only affect cable companies and not developers acting as private cable operators, leaving most of these contracts between homeowners association and homeowners in place. A number of states have laws prohibiting these practices. The State of Virginia should have at least a legal opinion from the State Attorney General into the legality of these practices. This opinion would set precedence and assist in resolving these cases.

Respectfully,

Hector Castro

Enclosure: (1) Master Communications Easements in the Fiber Age
(2) Virginia Condominium Code 55-79.74
(3) Cox Account Statement
(4) Virginia Telecommunications Bill of Rights
(5) United Property Associates Letter
(6) Letter RE: Marilyn Castro Customer ID: Cast2261
(7) Clause (m)
(8) Equity Title E-mail RE: Homeowners Agreement
(9) Letter RE: Exclusive Service Contract for Provision of Video Services in Multiple Dwelling Units and Other Real State Developments MB Docket No. 07-51

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

ROBERT TATA
4536 GLENEAGLE DRIVE
VIRGINIA BEACH, VIRGINIA 23462

EIGHTY-FIFTH DISTRICT

COMMITTEE ASSIGNMENTS:
EDUCATION (CHAIRMAN)
TRANSPORTATION
APPROPRIATIONS

February 25, 2008

Mr. Hector Castro
[redacted]

Dear Mr. Castro:

Enclosed please find a reply from the Attorney General's office regarding your request for opinion concerning exclusive and bulk billing communication contracts between developers, telecommunications providers and homeowners.

I hope this will answer some of your questions but I understand that since these matters are pending, there isn't much that can be done at this time.

If I can be of service to you regarding other matters concerning the state, please don't hesitate to contact my office.

Sincerely,

Robert Tata

Enclosure

DISTRICT: (757) 340-3510 * RICHMOND: (804) 698-1085

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

February 20, 2008

The Honorable Robert Tata
Member, House of Delegates
P.O. Box 406
Richmond, Virginia 23218

Dear Delegate Tata:

Thank you for your letter to Attorney General Bob McDonnell requesting an opinion concerning exclusive and bulk billing communication contracts between developers, telecommunications providers and homeowners.

As we began the process of researching the questions you raised, we discovered that these matters are pending before a court.[1] The long standing policy of the Office is to refrain from expressing an opinion about a matter currently in litigation or before a *court unless requested by the court before which the matter is pending*.[2] Because of the pending litigation, we are not in a position to provide a formal response to your inquiry.

I apologize that I am not able to be more helpful and for the delay in providing you with this information. Please do not hesitate to contact me at (804) 786-7240.

With kindest regards, I am

Sincerely,

Stephanie I. Hamlett
Deputy Attorney General

---

[1] *See* Nat'l Multi Housing Council v. United States, Case No. 08-1017 (D.C. Cir.) (filed Jan. 16, 2008), *available at* http://www.nmhc.org/Content/ServeFile.cfm?FileID=6148. The case arose from a decision of the Federal Communications Commission in "Docket No. 07-51." *See id.*; *see also* "In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments," Federal Communications Commission MB Docket No. 07-51, Erratum (Dec. 20, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279110A1.pdf; Report and Order and Further Notice of Proposed Rulemaking (Oct. 31, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-189A1.pdf.

[2] 1977-1978 Op. Va. Att'y Gen. 31.

Enclosure (5)

THELMA D. DRAKE
2ND DISTRICT, VIRGINIA

COMMITTEE ON ARMED SERVICES
SUBCOMMITTEE ON TERRORISM AND UNCONVENTIONAL THREATS
SUBCOMMITTEE ON MILITARY PERSONNEL

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

HOUSE REPUBLICAN POLICY COMMITTEE
SUBCOMMITTEE ON SECURITY
CO-CHAIR

Congress of the United States
House of Representatives
Washington, DC 20515–4602

January 23, 2008

WASHINGTON OFFICE:
1208 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4215

DISTRICT OFFICES:
4772 EUCLID ROAD
SUITE F
VIRGINIA BEACH, VA 23462
(757) 497-5859

23386 FRONT STREET
ACCOMAC, VA 23301
(757) 787-7836

www.drake.house.gov

Ms. Marilyn Castro
[redacted]
[redacted] VA 23462-4650

Dear Ms. Castro,

Enclosed please find the response I received from the U.S. Federal Communications Commission addressing the inquiry which was made on your behalf. I believe you will find it self-explanatory. If not, please feel free to contact me with any further questions or concerns.

It is an honor to serve as your Congresswoman. If you ever require additional assistance, please do not hesitate to contact me.

Sincerely,

Thelma Drake

Thelma Drake
Member of Congress

Enclosure
TD/cw

Federal Communications Commission
Washington, D.C. 20554

January 16, 2008

IN REPLY REFER TO:
CN-0702724

The Honorable Thelma D. Drake
U.S. House of Representatives
4772 Euclid Road
Suite E
Virginia Beach, Virginia 23462

Dear Congresswoman Drake:

Thank you for your letter on behalf of your constituent, Ms. Marilyn Castro of Virginia Beach, Virginia, regarding a *Report and Order and Further Notice of Proposed Rulemaking* (FCC 07-189) that recently was adopted by the Federal Communications Commission. I appreciate the opportunity to respond.

The *Report and Order and Further Notice of Proposed Rulemaking* adopted by the Commission on October 31, 2007 generally proscribes "exclusivity clauses" for the provision of video services by certain multichannel video programming distributors ("MVPDs"), such as cable television system operators, to the residents of multiple dwelling units ("MDUs"), including condominiums and apartments buildings, as well as other real estate developments. As Ms. Castro notes in her correspondence, the *Report and Order* expanded the definition of "MDU" to include "other centrally managed real estate developments," such as gated communities, garden apartments, and mobile home parks. The Commission indicated that these types of dwellings are private individual households, but share common spaces that require central management.

Among other things, the *Report and Order* prohibits the enforcement of existing exclusivity clauses and the execution of new contracts that include exclusivity provisions. Specifically, effective 60 days after the *Report and Order* is published in the Federal Register, a MPVD that is subject to the Commission's decision, such as a cable television system operator, cannot enforce or execute any contractual provision that grants the MVPD the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU. Other provisions of the contract, however, are not affected by the Commission's *Order*, and the cable television operator generally may continue to serve MDU residents who wish to subscribe to cable television service. Therefore, if a cable television system operator has an exclusive right to serve the residents of a MDU, the exclusivity provision will not be enforceable 60 days after the Commission's decision is published in the Federal Register, and an additional MPVD may be authorized to serve the residents. The *Report and Order* was published in the Federal Register on January 7, 2008. Thus, the Commission's decision is scheduled to become effective on March 7, 2008.

In her correspondence, Ms. Castro also indicates that she does not receive an individual bill for cable television service. Rather, the condominium appears to receive a "bulk bill," and, in turn, bills individual residents for the cable television service. Ms. Castro suggests that the Commission should take steps to "ban bulk billing arrangements." The *Further Notice* adopted by the Commission requests public comment on several issues, including whether the Commission should prohibit exclusive marketing and bulk billing arrangements. Such arrangements may constrain the ability of competitive MPVDs to market their services directly to MDU residents, and may require residents to continue paying a fee for the services of the MPVD with the bulk billing contract, as well as pay a subscription fee to the alternative video programming provider. Interested persons, such as Ms. Castro, may file comments with the Commission on or before February 6, 2008 and reply comments must be submitted no later than March 7, 2008.

For your review and to provide Ms. Castro additional information, I have enclosed a copy of the *Report and Order and Further Notice of Proposed Rulemaking*. Ms. Castro may wish to review paragraph 68 of the *Further Notice* for guidance regarding the submission of comments to the Commission.

I hope this information is helpful. Please do not hesitate to contact me if I may be of further assistance.

Sincerely,

Michael S. Perko
Chief, Office of Communications and Industry Information
Media Bureau

Enclosure

Enclosure (6)

Master Communications Easements in the Fiber Age

This approach maximizes developer rights while providing incentives to build fiber

By Jeffry L. Hardin and James N. Moskowitz ■ *Fleischman and Walsh, L.L.P*

Access to the latest broadband services is quickly becoming a necessity for new homebuyers. As a direct result, many new homebuyers now consider availability of these services when making home buying decisions.

In the past, when telephone and video services were fairly standard, developers gave little thought to what communications services might be available in their new housing developments. Today, meeting the expectations of increasingly tech-savvy homebuyers requires that developers ensure that advanced broadband services are available in their new developments. It is for this reason that more and more new residential communities in the United States include fiber-to-the-home (FTTH) communications solutions as an amenity.

The successful implementation of a FTTH (or "wired community") arrangement almost inevitably requires that the developer retain control over access to the community by communications service providers. Controlling access allows the developer to offer exclusive arrangements to service providers. That's an incentive for them to construct state-of-the-art fiber facilities and to deliver the latest fiber-enabled voice, video, Internet, and home monitoring services.

A Master Communications Easement (or "MCE") arrangement also allows the developer to obtain these services in bulk for the community as a whole on terms that are more favorable to the residents than the residents individually could achieve. This is because the selected services provider is assured of a higher customer take rate that will generate a revenue stream sufficient to justify lower prices to residents while also covering the significant up-front costs inherent in deploying fiber facilities.

This prospect of high penetration is often the only economically feasible way to support the capital investment necessary to construct and operate a state-of-the-art FTTH communications infrastructure.

Developers and property owners can retain control over access to their communities through the use of a MCE. This article will explain the usual elements of a MCE, describe how one typically creates a MCE, and provide a brief outline of some of the recurring strategic and legal issues associated with using a MCE in a wired community arrangement.

The Basics of the Master Communications Easement

The MCE is a private easement (actually a bundle of several easements) that authorizes both the installation of communications infrastructure within a new housing or multi-family development and the provision of communications services to homeowners. The MCE typically is exclusive, where permitted under state law. This means that communications facilities and services can only be provided on the property with the express consent of the holder (or grantee) of the MCE. Because a MCE limits service provider access to the community, the penetration or market share of the preferred service provider is likely to be quite high if not 100 percent.

This prospect of high penetration is often the only economically feasible way to support the capital investment necessary to construct and operate a state-of-the-art FTTH communications infrastructure. Absent the availability of preferential or exclusive access by a service provider to the development, such infrastructure might not be deployed in many instances. A MCE also better positions the developer to receive compensation from the selected service provider for providing the preferential or exclusive right to serve the community.

When drafting a MCE, it is important to preserve the distinction between the communications infrastructure (*i.e.*, the plant in the ground) and the services provided *over* that infrastructure. This preserves the greatest amount of flexibility in structuring wired community transactions.

The developer usually wants to strictly limit the ability of service providers to retrench or dig up the roads in order to install new infrastructure,

but often is more open to having multiple providers of services share the infrastructure that already is in place.

Distinguishing between communications infrastructure and the services provided over that infrastructure also permits possibly billing for the use and enjoyment of the infrastructure separately from charges for the communications services.

In any event, these distinct rights should, at a minimum, be taken into account when developing a wired community strategy that involves a MCE.

It also is advisable to define "communications infrastructure" and "communications services" broadly enough to future-proof the MCE. While somewhat circular, "communications infrastructure" should be defined to include the tangible personal property related to the provision of "communications services." For its part, "communications services" should be defined to include (in addition to voice, video, Internet and security services) other communications, data and information services that can be provided over the communications infrastructure.

The stated purposes of the MCE should include, in addition to the obvious purposes of installing and maintaining communications infrastructure, the marketing and provision of communications services within the community and the use of the communications infrastructure to serve end users located *outside* of the community.

Multiple Easements within the MCE

The MCE typically grants several easements over the property. While at times this may seem redundant, these easements serve separate legal purposes. An all-encompassing "blanket" easement covering the entire property gives the developer and the selected services provider maximum flexibility for locating the communications infrastructure, while also precluding unauthorized provision of communications services anywhere in the community. A "perimeter" or "moat" easement around the inside boundary of the property typically also is included in the MCE. The perimeter easement effectively seals off the community from unauthorized access by other service providers.

The developer usually wants to strictly limit the ability of service providers to retrench or dig up the roads in order to install new infrastructure, but often is more open to having multiple providers of services share the infrastructure that already is in place.

It also is advisable for the MCE to grant a "common area" easement with respect to any existing or future common area or common property that has been or may be conveyed to the homeowners association for the community. Depending on when the MCE is granted, the HOA for the community sometimes must join in the grant of the MCE to cover common property previously conveyed to the HOA. If the MCE is granted before the HOA is formed or before it assumes control over any common property, then the HOA's title to the common property will be encumbered by the previously granted MCE. In addition to these three easements, a specific "access" easement for ingress and egress at the property also is included in the typical MCE.

A sometimes-contentious easement often included in the MCE relates to the granting of a private easement within any road, street or highway within the community and the continuation of such private easement following the public dedication of such roadway or any public right-of-way. The dedication process itself should not negate any pre-existing private easement in the roadway or right-of-way to be dedicated.

Under this approach, the public authority receives the dedicated roadway or right-of-way subject to the pre-existing private easement. This also preserves the ability of the holder of the private roadway easement to take the position that its communications infrastructure located under the public roadway or within the area subject to the public right-of-way is actually within its private easement. This can be useful when trying to avoid obtaining a video franchise to provide services in the development.

Before deciding to create a private communications easement in roads or rights-of-way that are to be dedicated to the public use, there are a number of considerations that should be taken into account. For example, local franchising authorities sometimes require a wired community provider that is offering video services to obtain a franchise, even if it holds a pre-existing private easement within the public right-of-way. (Under federal law, local franchising authorities are permitted to require that video service providers obtain a franchise to locate communications infrastructure in the public right-of-way.)

In addition, local authorities who are unfamiliar with having private easements embedded in a dedicated roadway or public right-of-way sometimes threaten to delay the dedication in order to review the legalities of the private roadway easement. Developers typically want to avoid any delay in dedication because it also delays their ability to sell lots in the development.

As a consequence, the roadway ease-

ment provisions sometimes are redrafted or even deleted in order to placate the local authorities and avoid these delays. Of course, elimination of the private roadway easement may result in the need for the selected video services provider to apply for a local franchise.

Creating A Master Communications Easement

It is imperative that the developer or property owner takes steps during the initial planning of the development to preserve its ability to grant a MCE. The plat for the property should expressly state, in clear and unequivocal language, that any public utility easements or public rights-of-way designated on the plat are only for use by public service companies and that telecommunications services providers may access the property only pursuant to a private easement granted by the property owner.

The property owner also should limit the scope of any utility easement to the specific utility service being provided by the company obtaining the easement (such as power, gas or water) and expressly preclude use of such public utility easement for communications services.

Recent court decisions in several states, including Florida, Georgia and Washington, support the notion that public utility easements are available for the transmission of communications services by public service companies or by third party communications service providers unless the easement expressly restricts such use. In addition to restricting the use of utility easements, the plat also should affirmatively state that the property owner reserves for itself the exclusive right to authorize both the installation of communications infrastructure and the provision of communications services within the property.

In addition to the plat, the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") for the development also should expressly permit the creation of a MCE. It also should expressly authorize the developer to arrange for the installation of communications infrastructure and the provision of communications services to the community.

To this end, it is advisable to adopt language in the CC&Rs that is generic in nature. This allows the developer to maintain maximum flexibility regarding the structuring of wired community arrangements. It also allows for changes in law and other circumstances.

Finally, the developer usually needs to obtain its lender's consent to the creation of the MCE. The lender also should confirm that the MCE and any sub-easements or licenses granted thereunder will not be subject to the lender's mortgage on the property, or at least will not be disturbed by the lender if it forecloses or otherwise exercises its rights under the mortgage.

Under this approach, the public authority receives the dedicated roadway ... subject to the pre-existing private easement. This ... preserves the ability of the holder of the ... easement to take the position that its communications infrastructure located under the public roadway ... is actually within its private easement. This can be useful when trying to avoid obtaining a video franchise.

Granting a MCE

Once the proper groundwork has been laid, the next step is for the developer or property owner to grant a MCE. One approach often taken in wired community arrangements involves the developer granting the MCE to a wholly-owned special purpose entity ("SPE"), formed to act as the communications gatekeeper for the community. Having the developer's SPE hold the MCE allows the developer to continue managing the relationships with the selected service providers, even after the developer turns over management of the community to a homeowners' association or similar organization.

This step also moves the legal and contractual issues associated with a MCE away from the property owner, which often also is a special purpose entity of the developer formed for the purpose of acquiring and developing the property. Instead, the MCE is held by a separate entity whose existence and financial future is separate, to a certain extent, from that of the property owner and the developer.

A MCE granted by a developer to its SPE usually is exclusive and perpetual. It also expressly provides for the subsequent grant by the SPE of sub-easements and licenses (exclusive or non-exclusive; perpetual or limited in duration) to owners of the communications infrastructure and providers of the communications services at the property.

There are a few states that regulate the ability of landowners to enter into exclusive arrangements with communications providers for services to new housing developments. When the developer grants the MCE to its special

purpose entity, there are ways for a MCE to be exclusive without running afoul of these state laws.

One way to achieve this is by structuring the wired community arrangements so that the SPE is not the owner of the communications infrastructure or the provider of the communications services. Instead, the SPE in turn grants *non-exclusive* sub-easements or licenses to the owners of the communications infrastructure and/or providers of services.

Notwithstanding the non-exclusivity of such sub-easements and licenses, even a properly structured non-exclusive wired community arrangement usually results in other service providers opting to forego spending capital dollars to wire a community that already is receiving fiber-enabled services at rates that are usually lower than otherwise available at retail.

Third-Party Access to Wired Communities

During the earliest stages of developing a wired community strategy, developers and service providers should consider making provisions for allowing other third party providers to obtain access to the community. There are a number of reasons for this. The developer (or later, the HOA) simply may want to give residents in the development a choice of different providers. Or the developer may want to preserve the option of bringing in a third party provider if the initial selected provider proves unable to deliver the services, affordability, or level of quality that the residents require.

In addition, creating contingencies for providing future third party access should preserve the wired community structure in the event that there is some shift in state or federal policy that affects the rights of developers and/or service providers to enter into exclusive or preferred provider arrangements.

In order to provide a means for third party access within the wired community arrangement structure, it is advisable to require the holder of the MCE or a sub-easement granted under it to provide access, on just and reasonable rates, terms and conditions, to any qualified third party provider that requests access.

Such access can be granted by allowing the use of the existing communications infrastructure or by granting a license to use the easements. The rates and terms for third party access need not be spelled out in advance, but can be left for future good faith negotiations by the holder of the MCE or sub-easement and the third party service provider.

The likelihood of another communications service provider paying even minimal amounts for access to a community that already is receiving fiber-enabled services at bulk service rates is somewhat remote, given the current economics of the industry.

Conclusion

The MCE is one of several sophisticated legal arrangements that lead to a successful wired community arrangement for a master planned residential community. Proper planning for, and recordation of, a well crafted MCE preserves the developer's right to control access to the community by communications services providers. It also helps support the financial decision to commit capital dollars to the build out of a fiber communications infrastructure in the community. As such, MCEs are an invaluable tool for ensuring that the latest suite of broadband services is available to new homebuyers, especially in a more remotely located new housing development. **BBP**

About the Authors

Jeffry Hardin is a partner in the corporate group and James Moskowitz is an associate in the telecommunications group at the law firm of Fleischman and Walsh, L.L.P., located in Washington DC.

Public Rights-of-Way and Marketing Exclusivity

Avoiding franchise rules while preserving exclusivity in wired communities

By Carl E. Kandutsch ■ *Ph.D., J.D.*

In this article, we examine two legal issues that may arise in connection with a private cable operator's use of public rights-of-way in order to provide broadband services to residents of an HOA Community. By "HOA Community," we refer to any community governed by a Homeowners Association, including condominium developments, planned unit developments, some residential subdivisions, and master planned communities.

The first issue concerns cable television franchises: If the selected provider locates its network facilities on what is or will be (when construction is complete and lots are sold) a public right-of-way (PROW), will the provider be required to negotiate a cable television franchise with the local municipal or county government?

The second issue focuses on exclusivity: Can the developer, and later the Home Owners' Association, convey exclusive access rights to a single selected broadband provider, such that only that provider has a legal right to provide services to master planned community (MPC) residents?

Broadband Properties has been at the forefront of publications documenting the imaginative ways in which real estate developers, broadband service providers and municipal planners are changing the concept of community itself, by blurring traditional distinctions between the traditional public and private models for community organization. Challenging traditional models of community organization will become increasingly important as the idea of customer-owned or operated communications networks presents itself as an attractive alternative to the top-down model of centrally controlled networks owned by huge cable and telephone companies.

If the selected provider locates its network facilities on what is or will be (when construction is complete and lots are sold) a public right-of-way, will the provider be required to negotiate a cable television franchise with the local municipal or county government?

One articulation of this challenge is the idea of a "wired community," one that includes, from the initial design stage through the completion of construction, a bottom-up and fully integrated state-of-the-art broadband communications infrastructure, conceived as an essential utility not unlike electric and sewer systems. Such wired communities enable a degree of user control over the network that is not available to communities that must passively wait for and accept whatever communications infrastructure and service packages the established carriers decide to offer.

The most innovative wired communities are not necessarily publicly owned. In the US, they are more commonly the result of joint planning, investment and partnership between real estate developers and broadband providers (often private cable operators and CLECs). Each relies on the other's expertise to ensure that communications networks will be fully integrated into the community's shared infrastructure from the very beginning.

Fiber-to-the-Premises (FTTP) is the technology of choice for wired communities, because the huge data capacity of FTTP (together with its reliability and low maintenance costs) guarantee that once installed, the infrastructure will remain viable – able to deliver the most bandwidth-intensive applications – for the foreseeable future.

Provision of video, voice and data services to single-family home developments does require some adjustment of the traditional private cable operator business model, which has traditionally been tailored to the multi-dwelling unit (MDU) environment. Rather than dealing with a landlord, the PCO is partnering with a real estate developer, and later the HOA. And instead of wiring a building, the provider is wiring a community. The legal environment for wired communities is different as well,

because deploying infrastructure in an HOA community will often require that facilities be located on or under rights-of-way that are – or upon completion of construction will be – public streets.

Cable Television Franchises

Federal law, of course, requires that anyone providing video programming over a "cable system" must operate under the authority of a franchise granted by the local municipal or county government. The local franchise requirement is premised on the assumption that local government has primary jurisdiction over public rights-of-way, and any private interest that uses public rights-of-way must compensate the community for its use of public property.

This regulatory scheme may change radically in the near future. Anyone who reads the news these days knows that the legal framework for cable television is evolving at a rapid clip, particularly with respect to local regulatory authority over cable systems. There is a movement afoot to all but eliminate local regulatory authority over cable, by legislatively replacing the local franchise system with a statewide or national franchising system for any video provider that uses a public right-of-way.

The few remaining former Bell telephone companies, especially Verizon and AT&T (formerly SBC), have been investing heavily in FTTx networks across the country in order to compete with cable companies in video markets. These efforts have included intense lobbying in state legislatures and in Congress to reform the local video franchising framework. So far, statewide video certificate laws have been enacted in Texas, South Carolina, Virginia, Kansas, Indiana and New Jersey, and are under consideration in another dozen states. Rep. Joe Barton's telecommunications bill in the U.S. House of Representatives would establish a national franchise system in lieu of the existing local franchise system.

Finally, the FCC recently initiated a rule-making proceeding dealing with ways to reduce the regulatory burdens associated with negotiating individual franchise agreements with multiple local governments.[1]

Thus, it seems likely that the local cable franchise system is headed for extinction in the near future. This may be bad for large franchise operators like Time-Warner and Comcast, because a significant entry barrier will be eliminated for the powerful telephone companies. But it will provide a window of opportunity for ambitious PCOs to expand their service offerings to include many communities they have ignored because these properties could not be efficiently wired without crossing public rights-of-way.

The most innovative wired communities are not necessarily publicly owned. In the US, they are more commonly the result of joint planning, investment and partnership between real estate developers and broadband providers (often private cable operators and CLECs). Each relies on the other's expertise to ensure that communications networks will be fully integrated into the community's shared infrastructure from the very beginning.

Under the new franchising frameworks being proposed, the provider would use a relatively streamlined procedure to obtain a statewide (or national) video certificate. The certificate would authorize the use of public rights-of-way anywhere in the state, subject to an annual five percent (of revenue) "franchise fee" payable to each local franchising authority in which systems are deployed.[2]

For the moment, however, in most states a video system that crosses a public right-of-way must presumptively operate under a franchise awarded by the local municipal or county government. This requirement originates in Section 621 of the Federal Cable Act,[3] and applies to "cable systems" generally. However, the so-called "private cable exemption" excludes from the definition of "cable system" any system that doesn't "use" a public right-of-way.[4] PCOs have traditionally relied on this exemption to escape the need to negotiate cable franchise agreements, but the price has been foregoing otherwise attractive business opportunities, where serving the property would entail crossing public rights-of-way.

There is a split of judicial authority on the question of whether a PCO that runs its cabling across a single public right-of-way thereby "uses" the PROW in a way that triggers the cable franchise requirement. After all, the purpose of the franchise is to compensate (monetarily and otherwise) the local community for use of public property by a private interest. The five percent (of gross revenues) "franchise fee" extracted from the franchised cable operator, together with universal service and public interest programming and various other obligations, constitute the compensation.

But if the burden placed on public property is de minimus – for example, placement of a fiber optic cable underneath and across a single public street – then the public policy rationale for requiring a cable franchise evaporates. At any rate, this was the Eighth Circuit Court of Appeals' conclusion in *Guidry Cablevision v. City of Ballwin*, 117 F.3d 383 (8th Cir. 1997). There, the court held that the local franchise authority's franchise requirement was pre-empted by the "private cable exemption" in Federal law, because the crossing of a single city street did not constitute "use" of a public right-of-way within the meaning of 47 U.S.C. § 522(7). In support of its ruling, the *Guidry* court emphasized not only the de minimus nature of the public burden,

but also that requiring a cable franchise in this circumstance would conflict with Congress' desire, expressed in the private cable exemption, to encourage "open entry in the satellite field for the purpose of creating a more diverse and competitive telecommunications environment."

Other courts have adopted a strictly literal reading of the statutory language, holding that a franchise is required whenever a provider's facilities cross at least one public right-of-way, and that the extent of the public burden is irrelevant to the legal requirement.

Regardless of how courts interpret federal law, it should be emphasized that local governments have a great deal of discretion in deciding whether or not a cable franchise is required. More often than not, local communities welcome new housing developments in their areas in order to increase their tax base, attract new businesses and gain other tangible benefits such as jobs. These communities have a strong interest in lowering the regulatory barriers to new entry by broadband providers and will not insist on asserting their cable franchise authority if doing so might deter new development.

It stands to reason, therefore, that developers and their PCO partners should maintain close contact with local government authorities, and when appropriate, seek written assurance that their wired community project will not require a full-blown cable television franchise either immediately or in the future. (Another strategy, for use in new, greenfield, developments, involves the location of communications facilities in private easements, before any rights-of-way are dedicated to public use. This point will be discussed in the final section of this article.)

Finally, a PCO may avoid the franchise requirement by distributing its video signal through leased common carrier facilities located in public rights-of-way, as long as the PCO has no management control over or ownership interest in the facility. This method is based on the FCC's 1998 decision in a case called *Entertainment Connections, Inc.*,[5] later affirmed by the Seventh Circuit Court of Appeals, and is not discussed in this article.

Can Developers Convey Exclusive Access Rights to a Single Provider?

The ability to ensure exclusive access for the chosen broadband provider is an important aspect of planning a developer/PCO partnership. This is because wiring a community for FTTP broadband services is an expensive proposition. Lacking the economies of scale possessed by huge cable and telecommunications incumbents, most private cable operators are understandably reluctant to undertake the large investment required to wire a community without the expectation of a high penetration rate. The way to get a high rate is through exclusive access to potential subscribers.

In many cases, exclusivity can be achieved as a practical matter through a bulk service agreement with the HOA, whereby subscription to PCO services is made a mandatory condition of owning a home in the development. Although subscription is mandatory, services are provided at a bulk rate that would not otherwise be available to subscribers on an individual retail basis. Assuming that the services are state-of-the-art (for example, over FTTP), mandatory bulk services can be a positive selling point for the technologically literate developer, rather than a burden.

In other cases, however, the developer will not agree to a bulk arrangement. Because the private cable operator's billing relationship will be with the individual subscribers rather than with the HOA, it is important to know whether there are any legal problems associated with seeking exclusive access to rights-of-way within the development.

The concept of exclusivity has unpleasant connotations in public policy discussions. It suggests monopolization, lack of choice, and harm to consumer welfare. As a result, policy makers at all levels of government have used various methods of prohibiting or restricting the use of exclusive access contracts dealing with the delivery of telephone and video services. While exclusivity is for the moment unregulated at the federal level (except for traditional telephone service), efforts to restrict exclusive access contracts for video and high-speed data are likely to reappear, and some states have already imposed such restrictions. These efforts should neither be generally endorsed nor generally condemned; the truth is, the benefits or harms of exclusive contracting can only be evaluated in light of its empirical effects in particular circumstances.

In the PCO industry, restrictions on exclusivity come in the form of mandatory access laws, which provide franchised cable operators with a statutory right to install their facilities on private property without the property owner's consent. In multi-dwelling unit (MDU) markets, some states and localities have enacted mandatory access laws giving cable franchises a paramount right to wire apartment and condominium buildings in order to provide service to residents. These laws prevent MDU owners and condominium developers or associations from forming exclusive access agreements with PCOs, and thus suppressing competition for video services.

In HOA communities and other single-family housing developments, the primary restriction on exclusivity originates in federal law.[6] Section 621 of the federal Cable Act (47 U.S.C. § 541(a)(2)) provides:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses.

This statute allows a franchised cable operator to install its infrastructure over (a) any "public rights-of-way," and through (b) any easements "which have been dedicated for compatible uses" in a housing subdivision or other development, notwithstanding the existence of an exclusive access agreement between a developer or HOA and a particular communications provider. Therefore, to the extent that use of those public rights-of-way or compatible-use easements allows the cable operator to reach individual residents in an HOA community, the exclusivity provisions of an access agreement would be unenforceable, because the HOA cannot override or annul the cable operator's statutory right of access.

The scope of section 621 is ambiguous, however: there is a split of judicial authority regarding the meaning of (b) – whether the "easements" to which cable operators have access includes *all easements, public and private, as long as they are "dedicated for compatible uses,"* or only easements that are, like the rights-of-way mentioned earlier in the statute, *dedicated to public (and compatible) uses.* If the statute applies only to dedicated public easements, it is much easier for the developer to control access to the development, by granting exclusive private easements to the chosen provider. Those private easements would not then be available for use by competitors, including the franchised cable operator.

On the one hand, there is a line of cases stemming from the Third Circuit Court of Appeals' decision in *Cable Invs., Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989), holding that under section 621, a franchised cable operator has access only to rights-of-way and easements that have been dedicated to public use. "Dedication" to public use requires some official act by which local government accepts legal responsibility for maintaining the right-of-way for use by the general public.

Although state law or local ordinances may specify when and how this occurs, as a general matter, an easement in a new housing development is publicly dedicated when the government votes to accept a subdivision plat that identifies particular rights-of-way as public streets or thoroughfares. This interpretation represents the majority view in the United States, having been adopted (with minor variations) by the Eleventh, Ninth, Fourth and Eighth Circuits, as well as by numerous U.S. District Courts.

On the other hand, a number of decisions originating in Florida have held that section 621 prevents a HOA from using private agreements to block a franchised cable operator's ability to install infrastructure along or across dedicated general utility easements, if the designated purposes of the easements are compatible with the provision of cable television. In this view, the purpose of Section 621 is to authorize the cable operator to "piggyback" on easements dedicated to electric, gas or other general utility transmissions, such that the law forbids any private agreement that would prevent a cable franchise from using dedicated utility easements.

The Solution: Private Easements

Notice that the cable franchise problem arises only to the extent that a PCO uses a public right-of-way, and the exclusivity problem arises only to the extent that a new housing development includes public rights-of-way or easements that are dedicated to public or general utility use.

It follows that both problems may be avoided or at least mitigated by careful planning to either minimize or control the access provided through the use of public rights-of-way in a private development. For example, a cable franchise is only required when the provider "uses" a public right-of-way by locating facilities on or under the public right-of-way. Arguably, however, if those facilities are installed in a *private* right-of-way that is conveyed *before* the right-of-way is dedicated to public use, the PCO is not "using" the public right-of-way at all.

Similarly, the local cable franchise statutory right-of-access applies only to the extent that easements are either public or dedicated to general utility uses. If the development project does not use public or general utility easements, or if any such easements are placed such that a user of the easements cannot access individual residences without crossing private property, a cable franchise's access under Federal statute will be limited. That allows the developer greater control and, assuming there are no other legal impediments, the ability to form exclusive access agreements with a broadband service provider selected on the basis of merit rather than by default.[7] **BBP**

About the Author

Carl Kandutsch is a former FCC attorney now in private practice providing consulting services on behalf of broadband service providers and real estate professionals. He invites those with comments, questions or consulting inquiries to contact him at ckandutsch@adelphia.net or by phone at 207-659-6247.

References

[12] It should be emphasized that none of the franchise reform laws being discussed would remove local regulatory over how PROWs are used, or the ability of Local Franchise Authorities to extract a five percent fee based on revenue generated from such use.

[3] Some of the new legislation is ambiguous with respect to whether the franchise fee is based on revenue generated from all systems within the franchise area, or only those that actually utilize PROWs. If the fee is based on all systems, the provider can create a separate affiliate to own and operate its traditional PCO systems that do not cross PROWs.

[4] 47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.").

[5] 47 U.S.C. § 522(7).

[6] 13 F.C.C. Rcd 14277 (1998), *aff'd., City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

[7] Possible state laws and regulations dealing with exclusivity or other preferred provider arrangements should not be ignored. Numerous state legislatures and/or public utility commissions are discussing ways to regulate preferential or discriminatory contracts between developers, HOAs and service providers, and most states have laws allowing HOAs to nullify long-term or self-dealing contracts made by real estate developers before control is turned over to the owners.

[8] It is important to emphasize that some states and municipal ordinances may limit a developer's right to restrict access to easements or to form exclusive service contracts on behalf of homeowners in a planned development. For example, Florida's Plat Act provides that platted utility easements must allow access and use by franchised cable operators.

Enclosure (7)

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- Preferred – Up to 5Mbps ⇩ and 2Mbps ⇧ speed
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  - Qualifies for $5 monthly discount (reflected in price)!
- Preferred – Up to 5Mbps ⇩ and 2Mbps ⇧ speed

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